BARRIERS TO HOUSING COMMISSION
REPORT OF THE ZONING SUB-COMMITTEE

Introduction

The Zoning Sub-Committee of the Barriers to Housing Commission met 11 times from May 2 to August 1 to examine land use regulatory issues affecting housing production. The sub-committee represented many diverse interests including both for-profit and non-profit developers, banks, municipalities, and local and regional planners.

Several themes emerged from the sub-committee's discussions:

(1) localities are concerned that more housing will add to municipal service burdens and costs;
(2) the Commonwealth must take a more proactive role in providing financial incentives for housing development;
(3) there is a need to encourage municipalities not to enact unnecessary regulations that increase housing costs;
(4) there is a need to make legislative changes to deal with procedural problems that unnecessarily delay housing development and increase housing costs;
(5) there are available tools for responsible planning and zoning such as cluster development, transfer of development rights and density bonus provisions which could increase housing supply;
(6) there are newer avenues for growth and development, such as brownfields redevelopment and mixed use developments, which may make better use of land in developed areas; and,
(7) the Commonwealth must encourage both local and regional planning for housing.

Given the diverse composition of the sub-committee, not all members supported all recommendations. However, the committee believes that the report represents the combined best efforts of its membership to bring the immediate need to increase housing production to the forefront. The report makes findings and recommendations in the following areas for the Commission's consideration:

a. Municipal Cost Burden
b. Density Regulations
c. Growth Control Bylaws
d. Municipal Fees
e. Subdivision Control Regulations
f. Local Wetland Protection Bylaws
g. Appeals Process
h. Density Bonus Regulations
i. Mixed Use Development Projects
j. Brownfields Grant, Loan and Tax Programs

k. Urban Development Corporations
l. Regional Housing Supply Planning

Proposed Recommendations to Reduce Barriers to Housing Production

MUNICIPAL COST BURDEN

There is a common perception, sometimes justified, that new housing units create a fiscal burden on the local community. The actual burden is dependent upon the assessed values of new homes and the incremental cost for additional students and other services. In some communities, it is likely that high sales prices and assessed values of new homes may actually generate net revenue. However, some communities may have a negative impact based on school capacity, extent of infrastructure, and available services (e.g., public safety, public works and recreation programs).

To determine the validity and extent of the claimed fiscal burden, a uniform methodology for determining the "cost of services" must be established and accepted by all parties to the housing production equation, which can then be used to establish the "true" cost of new housing units. With this "cost of services" in hand, a program or combination of programs can be developed, whether subsidy or fee-based, to defray the impact.

Recommendation

The state should establish a comprehensive model for local aid which, on a community by community basis, assesses the impact of new housing. Such a model may reallocate some portion of existing aid and establish a state local aid impact fund to defray the true impact of new housing construction on cities and towns.

DENSITY REGULATIONS

Density regulations, such as minimum lot area requirements, minimum frontage requirements and low density per acre requirements, are the most significant barriers to the production of housing in the Commonwealth. Density regulations in many communities have increased the competition for available smaller lots, dispersed development, wasted valuable land resources, and have increased the costs of public and private services. Moderate income home purchasers are being excluded from communities because of land costs and the selling cost of existing homes, and are finding the available small lots selling at prices beyond their means.

Although the issue of density regulations must be addressed, the Commission does not believe that a viable solution to the problem lies in a blanket statutory prohibition on

municipalities enacting density regulations such as minimum lot size requirements. Establishing mandatory density regulations is not an acceptable technique for increasing housing production. Not only is such a solution unfair to areas already fully developed, but in some cases the requirement of certain density regulations may be justified by topographic or soil conditions and should be continued if such land is to be developed at all. The Commission also recognizes that home rule means that a municipality has the right, through legislated authority, to determine the location, manner and type of development it will permit within its boundaries. The State Legislature has repeatedly upheld this concept in legislation relating to zoning and subdivision control.

The Commission concludes that the Commonwealth needs a more energized and focused effort for increasing housing production.

Recommendations

1. **The Commonwealth should encourage communities to use the 40B process as a way of increasing production of market housing as well as affordable housing. The Commonwealth should design programs that reward communities that use this process in a friendly manner by defraying the municipal costs incurred by increased housing production.**

2. **The Commonwealth should examine all existing housing programs to determine if there are ways they can be revised to further increase housing production. For example, DHCD should review the LIP Program to see if the current guidelines make it economically feasible for a developer to construct housing under that program. Proposed program changes should be widely disseminated to the municipal and development interests affected by such changes.**

3. **The Commonwealth should encourage local adoption of zoning regulations that support higher density housing near commercial and transit uses. Such actions could discourage sprawl and spread of development to "green" areas.**

4. **A committee should be established by the Legislature that includes local officials, developers, planners and housing advocates for the purpose of recommending programs, legislation and planning tools that will increase housing production in the Commonwealth. Such programs, legislation and planning tools should be available at local option so as to maintain local autonomy. In order to accomplish this aim, revenue sources and grant programs should be directed to those communities that use such programs, legislation and planning tools and work cooperatively with the Commonwealth in increasing housing supply.**

GROWTH CONTROL BYLAWS

The enactment of local bylaws which impose limitations on the number of building permits which can be issued in any one year, or which permit only a certain percentage of units in any one development to be constructed in one year, or which prohibit development for one or more years is resulting in significant barriers to housing creation at all income levels. Most municipalities impose these growth controls in order to study infrastructure needs or to review zoning. Some municipalities, however,
impose growth controls simply to severely curtail new development or redevelopment projects without a clear action plan to resolve or correct the particular growth issue. See Sturges v. Town of Chilmark, 380 Mass. 246 (1980); Collura v. Town of Arlington, 367 Mass. 881 (1975). Moreover, Executive Order 215 provides that the imposition of a moratorium may result in the loss of discretionary funding but it is unclear whether E.O. 215 has ever been enforced against a municipality. In exchange for financial assistance to communities exhibiting a greater municipal cost burden as a result of housing development, local building cap regulations should have limited duration and purpose. Our population is going to grow regardless of growth control by-laws. If, for example, 60 towns enact them, the remaining communities must then shoulder a disproportionate burden.

There are, at times, real issues confronting a municipality, in terms of water supplies, sewer capacities, or school enrollments, which need to be addressed. However, these issues are identifiable and resolvable within a predictable horizon. Therefore, growth or permit controls should be substantially limited in their enactment, scope, and duration, with specific thresholds for implementation and municipal action to resolve the concern leading to the imposition of controls. Case history in our state has shown that municipalities that enact these permit restrictions rarely, if ever, remove them from their bylaws, but rather continually renew them and frequently further restrict the number of units to be allowed annually, even after correcting water or sewer issues, or building new schools to address the student enrollment issues.

Recommendations

1. **Any municipal growth control by-law must: a) identify a specific problem(s) and include a reasonable stated duration; and b) contain a strategic plan to address the problem(s). The plan, which must be approved by DHCD, shall address the specific problem(s) and propose a timetable for solving the problem(s). Should the community seek to extend the bylaw for another duration, the community must revise its plan to explain the rationale for additional time and submit the revised plan to DHCD for approval.**

2. **Dwelling units of two bedrooms or less should be exempt from growth control measures enacted based on municipal finance concerns as there are likely to be few children living in these types of units, but they are vitally needed for young adults and seniors.**

MUNICIPAL FEES

Section 53G of GL c. 44 provides that any city or town provide rules for the imposition of "reasonable fees" for the employment of outside consultants. Many times, the amount of review fees accrued by the outside consultant in its review of a project design may exceed what is reasonably necessary to review a project. Moreover, some municipalities provide an applicant only one choice of review agent when at least four choices would be reasonable. Further, some municipalities charge permit fees that are well in excess of the reasonable cost in administering the permit program.

Recommendation

1. **Section 53G of Chapter 44 should provide clear standards for the retention of outside review consultants by allowing the developer a choice of not fewer than four review consultants. To avoid the appearance of a conflict and using the Conflict of Interest Law, MGL, Chapter 268A, as a guide, it is recommended that the list cannot include an individual who has worked for the developer in the past year and that the selected consultant must agree not to work for the developer for at least one year after the conclusion of the review. In addition, Section 53G of Chapter 44 should provide an administrative appeal to the city council or board of selectmen on the reasonableness of the scope of work to be performed by the consultant, and the reasonableness of the consultant costs to be expended on the review of a project.**

2. **If the recommendation above is enacted by the Legislature, then Section 53G of Chapter 44 should also authorize conservation commissions to impose reasonable fees for the employment of outside consultants.**

3. **DHCD should develop a model outside consultant review bylaw that can be readily adapted by a municipality.**

A tax has been defined as "an enforced contribution to provide the support of government." United States v. Tax Comm'n of Miss., 421 U.S. 599 (1975). In Massachusetts, a community may not levy, assess or collect taxes without the permission of the General Court. The distinction between a fee and a tax was discussed by the court in Emerson College v. Boston, 391 Mass. 415 (1984). The court concluded that the imposed charge by the city, which produced revenue for allocation to the general police and fire services, constituted a tax to defray the cost of a public benefit rather than a fee payable for a benefit limited to the owners of a buildings. In deciding Emerson, the court noted that fees share three common traits that distinguish them from taxes. First, they are charged in exchange for a particular government service that benefits the party paying the fee in a manner not shared by other members of society. Second, they are paid by choice in that the party paying the fee has the option of not utilizing the governmental service

and thereby avoiding the charge; and third, they are collected not to raise revenues but to compensate the governmental entity providing the service for its expenses.

There have been instances where imposed charges have been upheld as valid fees. For example, in Southview Co-operative Housing Corp. v. Rent Control Board of Cambridge, 396 Mass. 395 (1985), the court concluded that charges assessed against landlords by the Rent Control Board of Cambridge in connection with petitions for individual rent adjustments were valid fees. In Commonwealth v. Caldwell, 25 Mass. App. Ct. 91 (1987), the court found that a mooring and slip fee assessed to boat owners by a city's harbormaster pursuant to a municipal ordinance was a valid fee and not a tax. In both cases the court determined that the revenues raised directly compensated the government for the cost of providing the service.

Municipalities may be imposing fees that exceed the cost of the service being provided.

Recommendations

1. **Local permit and approval fees must be based upon the reasonable costs of permit program administration, and cannot be used as a mechanism to generate revenue in excess of the costs of administration for a particular board, commission or department. Communities should be required to provide a rationale for the fees charged, demonstrating the relationship between such fees and the cost of providing the particular service through the particular board, commission or department. Any application or permit request should be governed by the fee schedule in effect at the time of the submission of the application or permit request.**

2. **When review consultants are to be employed by the community, a developer should have a choice of not fewer than four review consultants. To avoid the appearance of a conflict and using the Conflict of Interest Law, MGL, Chapter 268A, as a guide, it is recommended that the list not include an individual who has worked for the developer in the past year and the selected consultant must agree not to work for the developer for at least one year after the conclusion of the review. In addition, there should be a process for administrative appeal to the city council or board of selectmen by a developer to permit the developer to contest the reasonableness of the scope of work to be performed by the consultant, and the reasonableness of the review consultants cost to be expended on the review of the project.**

SUBDIVISION CONTROL REGULATIONS

Excessive road and infrastructure design and construction standards add substantial cost and create a significant barrier to creation of housing. Reasonable engineering standards

can be established for infrastructure needs that can generally reflect public safety, health and environmental priorities.

Recommendations

1. **A working group of stake holders, including developers, municipal officials and engineering consultants should be formed for the purpose of recommending suggested construction standards that incorporate various conditions that would affect design and use of the roadways. This committee should also prepare a guidebook containing the suggested standards for distribution to cities and towns.**

2. **The Department of Housing and Community Development shall include adoption of the suggested construction standards as an action that can be used by a community to qualify toward obtaining housing certification pursuant to Executive Order 418.**

LOCAL WETLAND PROTECTION BYLAWS

A significant barrier to the development of housing is how wetlands are regulated in the Commonwealth. A municipality's power to regulate wetlands is shared jointly with the Commonwealth. Specifically, wetlands are regulated both under the State Wetlands Act and local wetlands bylaws enacted pursuant to the State Wetlands Act. There are two major reasons why this dual regulatory authority needs to be addressed.

First, municipalities have enacted wetland bylaws covering issues that are beyond the DEP's regulatory authority established under the Wetlands Protection Act. Some local wetlands bylaws have also introduced certain "no-build" and "non-disturbance" areas located either within a wetlands resource area buffer zone or beyond the buffer zone and in upland resource areas in excess of what may be necessary for environmental protection. In addition, some local wetlands bylaws include stormwater management guidelines in excess of the DEP Stormwater Management Guidelines.

Second, dual authority to regulate wetlands creates a bifurcated wetlands appeal process. Appeals under the State Wetlands Act are governed by Chapter 30A, the State Administrative Procedures Act, and administered through the Adjudicatory Rules and Wetlands Regulations. These appeals are made initially to the DEP regional office, then through the Office of Administrative Appeals, and finally to Superior Court. However, appeals of orders issued under a local wetlands bylaw is by complaint to Superior Court in the nature of *certiorari* filed within 60 days after the issuance of a decision.

Similar to the Building Code, a standard and permitting/enforcement method for environmental, conservation, and health concerns needs to be established. Environmental, conservation, and health standards are necessary but they need to be

uniform, predictable, based on scientific or engineering fact, and have some compelling public benefit to their enactment.

Recommendations

1. **The State Wetlands Act should be the primary authority for the regulation of Wetlands in the Commonwealth. A municipality should have the ability to enact more stringent regulations if based on science and approved by the DEP.**

2. **In communities where local wetlands bylaws have been enacted, the current dual appeal process should be combined by creating a consolidated appeal process to be administered by DEP.**

It is also recommended that the DEP review their policies relative to appeals and consider the following suggestions.

1. Revise the DEP's Expedited Review Policy to permit expedited review of significant housing development opportunities such as large multifamily projects and/or affordable housing projects.

2. Eliminate several of the appeal routes/procedures provided under the Adjudicatory Rules that are not specifically based upon the Wetlands Act. For example, a person wishing to prolong an adjudicatory appeal may file a "motion for reconsideration" of the adjudicatory appeals decision issued by the administrative law judge ("ALJ") even though such request has no merit. See 310 CMR 1.01(14)(d). Such a request may significantly add to the delay in obtaining a "final" approval and has rarely, if ever, been successful in reversing a decision issued by the ALJ.

3. Mandate that appellants strictly comply with the specific regulatory part of the request filed.

4. Require appellants to post a bond when appealing to reduce the number of frivolous appeals.

5. Limit issues raised in an appeal to those expressly identified in the appeal, and preclude new issues for appeal which are gathered from those not a party to an appeal at DEP site visits or through ex parte contact with the DEP.

6. Mandate that strict timeframes be adhered to by both applicants and appellants under penalty of dismissal with prejudice, and without the ability to submit new information beyond regulatory timeframes.

APPEALS PROCESS

It is very inexpensive for communities and abutters to appeal subdivision approvals and tie up housing projects for years, yet costly for developers to litigate arbitrary decisions by boards. Currently appeals of zoning by-laws and subdivision decisions can be appealed to Superior Court. Under current law such appeals are not given precedence and can take up to one to three years for a final decision. Only the largest building companies have the cash flow to support the costs for these suits.

In addition, the State Zoning Act includes an obscure provision relating to the posting of bonds and the awarding of court costs resulting from appeals of approved subdivision plans. Specifically, Section 17 of the Sate Zoning Act (MGL c.40A, s. 17) provides that "the court shall require non-municipal plaintiffs to post a surety or cash bond in a sum of not less than two thousand nor more than fifteen thousand dollars to secure the payment of such [court] costs in appeals of decisions approving subdivision plans" … and that all appeals under Section 17 … "shall have precedence over all other civil actions and proceedings." Further, all the provisions of Section 17 relating to the posting of bonds and the awarding of court costs should be more broadly applied to the appeals of special permits in addition to appeals of approved subdivision plans.

Moreover, the appeals process gives an unreasonably powerful tool to anti-housing interests, since arbitrary and frivolous appeals can be lodged with little or no basis, cost or risk. The appeals process needs to be corrected and clarified so that it is a balanced and efficient resolution to genuine issues.

Recommendation

1. **Section 81BB of the State Subdivision Control Law should include language identical to Section 17 of the Zoning Act with respect to requirements for the posting of bonds and the awarding of court costs when a party appealing a decision approving a subdivision plan acts in bad faith or with malice in making the appeal to the court.**

2. **Section 17 of Chapter 40A should mandate the court to impose on non-municipal plaintiffs the requirement to post a surety or cash bond in a sum between $2,000 and $15,000 to secure the payment and award of court costs to the applicant in appeals of decisions approving special permits when the court determines the appellant acted in bad faith or with malice in making the appeal to the court.**

3. **In addition, or as an alternative, to requiring appellants to post a surety or cash bond, Chapter 40A, Section 17 and Chapter 41, Section 81BB should provide the applicant with the right to file an immediate, special motion to**

dismiss an appeal of an approval of a special permit and /or definitive subdivision plan approval if the applicant feels it can demonstrate that the appellant acted in bad faith or with malice in making the appeal to the court. In such circumstances when the court grants such special motion to dismiss based upon its findings of bad faith or malice, the court shall award the applicant both costs and reasonable attorneys fees including those costs and fees incurred for the special motion and any related discovery matters.

4. **Senate Bill No. 810 of 2001 would amend MGL, Chapter 183 by giving precedence to any civil action or proceeding involving real estate permits. A real estate permit is defined as any authorization, certificate, building permit, license, variance or other approval issued by an agency, department, board, commission, authority or other governmental body or official of the Commonwealth or any city, town, or other political subdivision thereof to any person, firm, corporation, or other entity for the erection, alteration, repair or removal of a building or structure upon land. The Legislature should enact and the Governor should support this legislation or similar legislation that would expedite litigation involving residential construction.**

DENSITY BONUS REGULATIONS

Many cities and towns have enacted bylaws or ordinances that are designed to reward the developer with a density bonus in exchange for the set-aside of a certain number of affordable units. Unfortunately, the vast majority of these bylaws have gone unused because most of them are unworkable. Even if they were workable, developers are frequently confused about how to implement affordable housing restrictions.

Recommendation

1. **In order to encourage the use of the density bonus incentive to create additional units of affordable housing without having to go through the Chapter 40B process, DHCD should develop a model affordable housing density bonus bylaw package which includes: a model inclusionary housing bylaw, a model affordable housing restriction, recommended marketing and sales practices, recommended process for managing the affordable units, and a step-by-step guide for the developer and municipality which describes the process for establishing and maintaining affordable units.**

2. **The Zoning Act should specifically allow municipalities to enact zoning provisions permitting housing density bonuses as a matter of right.**

MIXED USE DEVELOPMENT PROJECTS

Some cities and towns view residential housing development and commercial/industrial development in isolation, and do not consider the creation of mixed use zoning districts. With the recent phenomenon of the corporate campus and other large office-type developments, it appears that the developments would be ideally suited for the creation of the New England village style of development whereby commercial development can be surrounded by (or interspersed with) residential housing at all income levels. Given that the lack of affordable housing is a factor in out-of-state companies declining to move to the Commonwealth, several actions could encourage these companies to relocate to Massachusetts.

Recommendation

1. **The Commonwealth should provide incentives to companies looking to relocate to the Commonwealth and/or looking to develop corporate campuses to create housing to complement the commercial development. Such incentives could include enhanced tax increment financing which could be expanded to include housing creation as part of a mixed use development package. Other financing incentives which link commercial development incentives with housing creation could expand housing opportunities, and result in the creation of a revenue neutral project. Such incentives could be targeted for developments which locate in existing commercial/industrial areas as well as areas located adjacent to mass transit corridors.**

2. **Allow the abandoned building tax credit to be used to encourage the redevelopment of urbanized blighted areas into new neighborhoods.**

BROWNFIELDS GRANT, LOAN, AND TAX PROGRAMS

Over the past several years, particularly since the enactment of the hazardous waste brownfields amendments to Chapter 21E, the Commonwealth has created a whole menu of financing, grant and tax incentive programs designed to encourage the redevelopment of urbanized brownfields contaminated by oil and/or hazardous materials. The key focus of these Brownfields programs, as administered through the Governor's Office of Brownfields Revitalization, has been commercial/industrial development and related job creation.

Recommendation

Where brownfields are suitable for residential development, authorize such housing projects as eligible for state brownfields programs and related incentives to redevelop urbanized areas into housing for all income levels. For example, subsidized environmental insurance can provide incentives for redevelopment of housing and the cleanup of hazardous materials. The Brownfields Tax Credit and

Municipal Tax Abatement programs would also provide incentives to both remediate contamination and create additional housing opportunities.

URBAN REDEVELOPMENT CORPORATION

Urban redevelopment corporations are private, limited dividend entities which are created under Chapter 121A and 760 CMR 25.00 to develop residential, commercial, recreational, historic or industrial projects in areas which are considered to be blighted or substandard. The urban redevelopment corporation may not undertake more than one project nor engage in any other type of development activity. The corporation bears the responsibility for planning and initiating the project and owns the project throughout its existence. Chapter 121A authorizes the exemption of a project from real and personal property taxes, betterments and special assessments, and allows the project developer to exercise the power of eminent domain to assemble a development site in specified circumstances. By allowing the tax exemptions, urban redevelopment corporations act as catalysts for development in areas with high property tax rates. The reason Chapter 121A corporations have not recently been used for the creation of affordable housing is that by law, the 121A entity may earn no more than an 8% return on investment, and any excess profits (after all eligible deductions) must be returned to the municipality up to the level of tax that would have been assessed if the property were to include a non-121A entity.

Recommendation

Amend Chapter 121A to increase the return on investment to that permitted under certain programs under Chapter 40B (i.e., 20% of development costs for non-rentals, and 10% of equity for rental housing).

REGIONAL HOUSING SUPPLY PLANNING

Increasing and facilitating housing production should be examined from a regional perspective. Planning for housing in regions or sub-regions should be supported by the Commonwealth. Regional housing development decisions that are guided by the housing market, demographic conditions, the area's economy, and available or planned infrastructure target the areas where housing development should occur, prevents sprawl and encourages more efficient development. Regional planning agencies can serve as catalysts and conveners of regional planning for housing.

Recommendation

In addition to supporting the planning efforts supported by Executive Order 418, the Commonwealth should examine the applicability of regulatory tools, such as those of the Cape Cod Commission, as a way to direct housing production to areas

of greatest need, while protecting natural resources and assuring an adequate public transportation network and infrastructure for the housing to be built.

Zoning Subcommittee Participants

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"MINORITY REPORT" TO THE BARRIERS TO HOUSING COMMISSION REPORT OF THE ZONING SUB-COMMITTEE

Introduction

This "Minority Report" to the* Barriers to Housing Commission Report of the Zoning Sub-Committee *is submitted on behalf of those members of the Zoning Sub-Committee who did not fully support all recommendations found in the final report, yet believe that many of the recommendations are worthwhile. With that spirit in mind this report indicates those recommendations we found acceptable and those we did not, with reasons cited on those we did not. We were pleased to be a part of the Sub-Committee and look forward to working on the recommendations we believe are of merit. The text in "bold italics" is our addition while the "standard text"*** is the majority view and remains unchanged.***

While we still believe the* Report *reflects the majority point of view, i.e. that of the members of the development community actively involved in the housing industry, we acknowledge that our participation resulted in many of our comments being incorporated. We also believe that much anecdotal evidence was discussed which impacted the majority viewpoint. Based on our knowledge of planning and development in Massachusetts we note that much of the anecdotal evidence simply is not true throughout the Commonwealth. The need for affordable housing does indeed exist, but we question the whole premise for the need for addressing market rate housing in the Commonwealth.

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Several themes emerged from the Sub-Committee's discussions:

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(14) the Commonwealth must encourage both local and regional planning for housing.

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To determine the validity and extent of the claimed fiscal burden, a uniform methodology for determining the "cost of services" must be established and accepted by all parties to the housing production equation, which can then be used to establish the "true" cost of new housing units. With this "cost of services" in hand, a program or combination of programs can be developed, whether subsidy or fee-based, to defray the impact.

Recommendation

The Commonwealth should establish a comprehensive model for local aid which, on a community by community basis, assesses the impact of new housing. Such a model may reallocate some portion of existing aid and establish a state local aid impact fund to defray the true impact of new housing construction on cities and towns.

We do not support this recommendation. However, we would support an incentive program for communities that are addressing their housing needs. We cannot support re-allocation of local aid, but we could support the establishment of a local aid impact fund to defray the true impact of new housing construction on cities and towns.

DENSITY REGULATIONS

Density regulations, such as minimum lot area requirements, minimum frontage requirements and low density per acre requirements, are the most significant barriers to the production of housing in the Commonwealth. Density regulations in many communities have increased the competition for available smaller lots, dispersed development, wasted valuable land resources, and have increased the costs of public and private services. Moderate income home purchasers are being excluded from communities because of land costs and the selling cost of existing homes, and are finding the available small lots selling at prices beyond their means.

Although the issue of density regulations must be addressed, the Sub-Committee does not believe that a viable solution to the problem lies in a blanket statutory prohibition on municipalities enacting density regulations such as minimum lot size requirements. Establishing mandatory density regulations is not an acceptable technique for increasing housing production. Not only is such a solution unfair to areas already fully developed, but in some cases the requirement of certain density regulations may be justified by topographic or soil conditions and should be continued if such land is to be developed at all. The Sub-Committee also recognizes that home rule means that a municipality has the right, through legislated authority, to determine the location, manner and type of development it will permit within its boundaries. The State Legislature has repeatedly upheld this concept in legislation relating to zoning and subdivision control.

The Sub-Committee concludes that the Commonwealth needs a more energized and focused effort for increasing housing production.

Recommendations

3. **The Commonwealth should encourage communities to use the 40B process as a way of increasing production of market housing as well as affordable housing. The Commonwealth should design programs that reward communities that use this process in a friendly manner by defraying the municipal costs incurred by increased housing production.**

We support this recommendation.

4. **The Commonwealth should examine all existing housing programs to determine if there are ways they can be revised to further increase housing production. For example, DHCD should review the LIP Program to see if the current guidelines make it economically feasible for a developer to construct housing under that program. Proposed program changes should be widely disseminated to the municipal and development interests affected by such changes.**

We support this recommendation.

3. **The Commonwealth should encourage local adoption of zoning regulations that support higher density housing near commercial and transit uses. Such actions could discourage sprawl and spread of development to "green" areas.**

We support this recommendation.

5. **A committee should be established by the Legislature that includes local officials, developers, planners and housing advocates for the purpose of recommending programs, legislation and planning tools that will increase housing production in the Commonwealth. Such programs, legislation and planning tools should be available at local option so as to maintain local**

autonomy. In order to accomplish this aim, revenue sources and grant programs should be directed to those communities that use such programs, legislation and planning tools and work cooperatively with the Commonwealth in increasing housing supply.

We support this recommendation.

GROWTH CONTROL BYLAWS

The enactment of local bylaws which impose limitations on the number of building permits which can be issued in any one year, or which permit only a certain percentage of units in any one development to be constructed in one year, or which prohibit development for one or more years is resulting in significant barriers to housing creation at all income levels. Most municipalities impose these growth controls in order to study infrastructure needs or to review zoning. Some municipalities, however, impose growth controls simply to severely curtail new development or redevelopment projects without a clear action plan to resolve or correct the particular growth issue. See Sturges v. Town of Chilmark, 380 Mass. 246 (1980); Collura v. Town of Arlington, 367 Mass. 881 (1975). Moreover, Executive Order 215 provides that the imposition of a moratorium may result in the loss of discretionary funding but it is unclear whether E.O. 215 has ever been enforced against a municipality. In exchange for financial assistance to communities exhibiting a greater municipal cost burden as a result of housing development, local building cap regulations should have limited duration and purpose. The Commonwealth's population is going to grow regardless of growth control by-laws. If, for example, 60 towns enact them, the remaining communities must then shoulder a disproportionate burden.

There are, at times, real issues confronting a municipality, in terms of water supplies, sewer capacities, or school enrollments, which need to be addressed. However, these issues are identifiable and resolvable within a predictable horizon. Therefore, growth or permit controls should be substantially limited in their enactment, scope, and duration, with specific thresholds for implementation and municipal action to resolve the concern leading to the imposition of controls. Case history in the Commonwealth has shown that municipalities that enact these permit restrictions rarely, if ever, remove them from their bylaws, but rather continually renew them and frequently further restrict the number of units to be allowed annually, even after correcting water or sewer issues, or building new schools to address the student enrollment issues.

Recommendations

3. **Any municipal growth control by-law must: a) identify a specific problem(s) and include a reasonable stated duration; and b) contain a strategic plan to address the problem(s). The plan, which must be approved by DHCD, shall address the specific problem(s) and propose a timetable for solving the problem(s). Should the community seek to extend the bylaw for another**

duration, the community must revise its plan to explain the rationale for additional time and submit the revised plan to DHCD for approval.

While this recommendation is a good idea and we support programs that require ALL growth control by-laws to identify problems and contain strategic plans for solutions, we note that it erodes local community control when a state agency must approve of it. How about DHCD "review" rather than approval? There is also the presumption that some issues may be resolvable by a local community when only a regional solution will solve them. Also, community character is not something that is resolvable by adhering to a specific timetable, it is a continuing process and would require continuous revisions to a plan. We do not support this recommendation.

4. **Dwelling units of two bedrooms or less should be exempt from growth control measures enacted based on municipal finance concerns as there are likely to be few children living in these types of units, but they are vitally needed for young adults and seniors.**

We do not support this recommendation. Many families of more than 3 members are unfortunately forced to occupy two bedroom units. There are in fact likely to be numerous children in these types of units. Let's focus on providing adequate family housing rather than exempting one and two bedroom units and thus creating housing for young adults and senior at the expense of family housing.

MUNICIPAL FEES

Section 53G of GL c. 44 provides that any city or town provide rules for the imposition of "reasonable fees" for the employment of outside consultants. Many times, the amount of review fees accrued by the outside consultant in its review of a project design may exceed what is reasonably necessary to review a project. Moreover, some municipalities provide an applicant only one choice of review agent when at least four choices would be reasonable. Further, some municipalities charge permit fees that are well in excess of the reasonable cost in administering the permit program.

Recommendation

4. **Section 53G of Chapter 44 should provide clear standards for the retention of outside review consultants by allowing the developer a choice of not fewer than four review consultants. To avoid the appearance of a conflict and using the Conflict of Interest Law, MGL, Chapter 268A, as a guide, it is recommended that the list cannot include an individual who has worked for the developer in the past year and that the selected consultant must agree not to work for the developer for at least one year after the conclusion of the review. In addition, Section 53G of Chapter 44 should provide an administrative appeal to the city council or board of selectmen on the reasonableness of the scope of work to be performed by the consultant, and**

the reasonableness of the consultant costs to be expended on the review of a project.

We do not support this recommendation. Again local control is threatened. The local community should choose who will review applications before its boards, not the developer. Are we to allow the developers a voice in hiring a Town Engineer that many communities are fortunate enough to employ to review not only public projects but also development applications?

5. **If the recommendation above is enacted by the Legislature, then Section 53G of Chapter 44 should also authorize conservation commissions to impose reasonable fees for the employment of outside consultants.**

We do not support this recommendation unless local choice is retained.

6. **DHCD should develop a model outside consultant review bylaw that can be readily adapted by a municipality.**

We support this recommendation since models are always of value to a community in determining for itself the various means of accomplishing its goals.

A tax has been defined as "an enforced contribution to provide the support of government." United States v. Tax Comm'n of Miss., 421 U.S. 599 (1975). In Massachusetts, a community may not levy, assess or collect taxes without the permission of the General Court. The distinction between a fee and a tax was discussed by the court in Emerson College v. Boston, 391 Mass. 415 (1984). The court concluded that the imposed charge by the city, which produced revenue for allocation to the general police and fire services, constituted a tax to defray the cost of a public benefit rather than a fee payable for a benefit limited to the owners of a buildings. In deciding Emerson, the court noted that fees share three common traits that distinguish them from taxes. First, they are charged in exchange for a particular government service that benefits the party paying the fee in a manner not shared by other members of society. Second, they are paid by choice in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge; and third, they are collected not to raise revenues but to compensate the governmental entity providing the service for its expenses.

There have been instances where imposed charges have been upheld as valid fees. For example, in Southview Co-operative Housing Corp. v. Rent Control Board of Cambridge, 396 Mass. 395 (1985), the court concluded that charges assessed against landlords by the Rent Control Board of Cambridge in connection with petitions for individual rent adjustments were valid fees. In Commonwealth v. Caldwell, 25 Mass. App. Ct. 91 (1987), the court found that a mooring and slip fee assessed to boat owners by a city's harbormaster pursuant to a municipal ordinance was a valid fee and not a tax. In both cases the court determined that the revenues raised directly compensated the government for the cost of providing the service.

Municipalities may be imposing fees that exceed the cost of the service being provided.

Recommendations

3. **Local permit and approval fees must be based upon the reasonable costs of permit program administration, and cannot be used as a mechanism to generate revenue in excess of the costs of administration for a particular board, commission or department. Communities should be required to provide a rationale for the fees charged, demonstrating the relationship between such fees and the cost of providing the particular service through the particular board, commission or department. Any application or permit request should be governed by the fee schedule in effect at the time of the submission of the application or permit request.**

We support this recommendation since all communities' fees should be based on reasonable costs of permit program administration. We caution that the result of such a program may result in a realization of increased fees to developers.

4. **When review consultants are to be employed by the community, a developer should have a choice of not fewer than four review consultants. To avoid the appearance of a conflict and using the Conflict of Interest Law, MGL, Chapter 268A, as a guide, it is recommended that the list not include an individual who has worked for the developer in the past year and the selected consultant must agree not to work for the developer for at least one year after the conclusion of the review. In addition, there should be a process for administrative appeal to the city council or board of selectmen by a developer to permit the developer to contest the reasonableness of the scope of work to be performed by the consultant, and the reasonableness of the review consultants cost to be expended on the review of the project.**

We do not support this recommendation. Again local control is threatened and it is not proper for the developer to choose who will review his/her plans.

SUBDIVISION CONTROL REGULATIONS

Excessive road and infrastructure design and construction standards add substantial cost and create a significant barrier to creation of housing. Reasonable engineering standards can be established for infrastructure needs that can generally reflect public safety, health and environmental priorities. ***We note that MGL c. 41 is outside the review of this Sub-Committee on Zoning, however we understand that subdivision control and zoning are intertwined and will ultimately affect overall housing costs. Further study is needed.***

Recommendations

3. **A working group of stake holders, including developers, municipal officials and engineering consultants should be formed for the purpose of recommending suggested construction standards that incorporate various conditions that would affect design and use of the roadways. This committee should also prepare a guidebook containing the suggested standards for distribution to cities and towns.**

We support this recommendation if only a handbook for local communities is the result. Again, the more resources a community has to make an informed decision on local development, the better off the Commonwealth will be. The list of stakeholders should be expanded to include environmental planners.

4. **The Department of Housing and Community Development shall include adoption of the suggested construction standards as an action that can be used by a community to qualify toward obtaining housing certification pursuant to Executive Order 418.**

We support this recommendation but note that there would need to be a provision to allow for alternatives. "One size fits all" does not work. Local character will be lost if a community is forced to a standard in order to qualify for funding.

LOCAL WETLAND PROTECTION BYLAWS

While this report states that wetland regulation is a significant barrier to housing, it should be recognized that wetlands SHOULD be a "limiting factor" to any development project. PROTECTION OF THE ENVIRONMENT MUST GO HAND IN HAND WITH PROVIDING HOUSING. In fact, this discussion is outside of the purview of this Sub-Committee: Wetlands bylaws are not rules for zoning, but for environmental protection.

A significant barrier to the development of housing is how wetlands are regulated in the Commonwealth. A municipality's power to regulate wetlands is shared jointly with the Commonwealth. Specifically, wetlands are regulated both under the State Wetlands Act and local wetlands bylaws enacted pursuant to the State Wetlands Act. There are two major reasons why this dual regulatory authority needs to be addressed.

First, municipalities have enacted wetland bylaws covering issues that are beyond the DEP's regulatory authority established under the Wetlands Protection Act. Some local wetlands bylaws have also introduced certain "no-build" and "non-disturbance" areas located either within a wetlands resource area buffer zone or beyond the buffer zone and

in upland resource areas in excess of what may be necessary for environmental protection. In addition, some local wetlands bylaws include stormwater management guidelines in excess of the DEP Stormwater Management Guidelines.

Second, dual authority to regulate wetlands creates a bifurcated wetlands appeal process. Appeals under the State Wetlands Act are governed by Chapter 30A, the State Administrative Procedures Act, and administered through the Adjudicatory Rules and Wetlands Regulations. These appeals are made initially to the DEP regional office, then through the Office of Administrative Appeals, and finally to Superior Court. However, appeals of orders issued under a local wetlands bylaw is by complaint to Superior Court in the nature of *certiorari* filed within 60 days after the issuance of a decision.

Similar to the Building Code, a standard and permitting/enforcement method for environmental, conservation, and health concerns needs to be established. Environmental, conservation, and health standards are necessary but they need to be uniform, predictable, based on scientific or engineering fact, and have some compelling public benefit to their enactment.

Recommendations

1. The State Wetlands Act should be the primary authority for the regulation of Wetlands in the Commonwealth. A municipality should have the ability to enact more stringent regulations if based on science and approved by the DEP.

Our view of this recommendation is that communities ALREADY do this. If there are no local regulations, then DEP regulations are automatically in place. Local regulations ARE based on science. Local authority to set standards more strict than state regulations has been upheld in the courts. We do not agree that DEP should hold final say over local bylaws. We see no need for this recommendation.

2. In communities where local wetland bylaws have been enacted, the current dual appeal process should be combined by creating a consolidated appeal process to be administered by DEP.

We do not support the eroding of the appeal process as it stands today. We see no value in making it less rigorous with respect to environmental protection.

It is also recommended that the DEP review their policies relative to appeals and consider the following suggestions.

While the majority view was to forward these comments to DEP, we see no value in making these recommendations which dilute the appellants ability to appeal.

1. Revise the DEP's Expedited Review Policy to permit expedited review of significant housing development opportunities such as large multifamily projects and/or affordable housing projects.

2. Eliminate several of the appeal routes/procedures provided under the Adjudicatory Rules that are not specifically based upon the Wetlands Act. For example, a person wishing to prolong an adjudicatory appeal may file a "motion for reconsideration" of the adjudicatory appeals decision issued by the administrative law judge ("ALJ") even though such request has no merit. See 310 CMR 1.01(14)(d). Such a request may significantly add to the delay in obtaining a "final" approval and has rarely, if ever, been successful in reversing a decision issued by the ALJ.

5. Mandate that appellants strictly comply with the specific regulatory part of the request filed.

6. Require appellants to post a bond when appealing to reduce the number of frivolous appeals.

7. Limit issues raised in an appeal to those expressly identified in the appeal, and preclude new issues for appeal which are gathered from those not a party to an appeal at DEP site visits or through ex parte contact with the DEP.

8. Mandate that strict timeframes be adhered to by both applicants and appellants under penalty of dismissal with prejudice, and without the ability to submit new information beyond regulatory timeframes.

APPEALS PROCESS

It is very inexpensive for communities and abutters to appeal subdivision approvals and tie up housing projects for years, yet costly for developers to litigate arbitrary decisions by boards. Currently appeals of zoning by-laws and subdivision decisions can be appealed to Superior Court. Under current law such appeals are not given precedence and can take up to one to three years for a final decision. Only the largest building companies have the cash flow to support the costs for these suits.

In addition, the State Zoning Act includes an obscure provision relating to the posting of bonds and the awarding of court costs resulting from appeals of approved subdivision plans. Specifically, Section 17 of the Sate Zoning Act (MGL c.40A, s. 17) provides that "the court shall require non-municipal plaintiffs to post a surety or cash bond in a sum of not less than two thousand nor more than fifteen thousand dollars to secure the payment of such [court] costs in appeals of decisions approving subdivision plans" … and that all appeals under Section 17 … "shall have precedence over all other civil actions and proceedings." Further, all the provisions of Section 17 relating to the posting of bonds and the awarding of court costs should be more broadly applied to the appeals of special permits in addition to appeals of approved subdivision plans.

Moreover, the appeals process gives an unreasonably powerful tool to anti-housing interests, since arbitrary and frivolous appeals can be lodged with little or no basis, cost or risk. The appeals process needs to be corrected and clarified so that it is a balanced and efficient resolution to genuine issues.

Recommendation

5. **Section 81BB of the State Subdivision Control Law should include language identical to Section 17 of the Zoning Act with respect to requirements for the posting of bonds and the awarding of court costs when a party appealing a decision approving a subdivision plan acts in bad faith or with malice in making the appeal to the court.**

We do not support this recommendation since it erodes the public process.

6. **Section 17 of Chapter 40A should mandate the court to impose on non-municipal plaintiffs the requirement to post a surety or cash bond in a sum between $2,000 and $15,000 to secure the payment and award of court costs to the applicant in appeals of decisions approving special permits when the court determines the appellant acted in bad faith or with malice in making the appeal to the court.**

We do not support this recommendation since it too erodes the public process.

7. **In addition, or as an alternative, to requiring appellants to post a surety or cash bond, Chapter 40A, Section 17 and Chapter 41, Section 81BB should provide the applicant with the right to file an immediate, special motion to dismiss an appeal of an approval of a special permit and /or definitive subdivision plan approval if the applicant feels it can demonstrate that the appellant acted in bad faith or with malice in making the appeal to the court. In such circumstances when the court grants such special motion to dismiss based upon its findings of bad faith or malice, the court shall award the applicant both costs and reasonable attorneys fees including those costs and fees incurred for the special motion and any related discovery matters.**

We do not support this recommendation since it too erodes the public process.

8. **Senate Bill No. 810 of 2001 would amend MGL, Chapter 183 by giving precedence to any civil action or proceeding involving real estate permits. A real estate permit is defined as any authorization, certificate, building permit, license, variance or other approval issued by an agency, department, board, commission, authority or other governmental body or official of the Commonwealth or any city, town, or other political subdivision thereof to any person, firm, corporation, or other entity for the erection, alteration, repair or removal of a building or structure upon land. The Legislature**

should enact and the Governor should support this legislation or similar legislation that would expedite litigation involving residential construction.

We do not support this recommendation since it too erodes the public process.

DENSITY BONUS REGULATIONS

Many cities and towns have enacted bylaws or ordinances that are designed to reward the developer with a density bonus in exchange for the set-aside of a certain number of affordable units. Unfortunately, the vast majority of these bylaws have gone unused because most of them are unworkable. Even if they were workable, developers are frequently confused about how to implement affordable housing restrictions.

Recommendation

3. **In order to encourage the use of the density bonus incentive to create additional units of affordable housing without having to go through the Chapter 40B process, DHCD should develop a model affordable housing density bonus bylaw package which includes: a model inclusionary housing bylaw, a model affordable housing restriction, recommended marketing and sales practices, recommended process for managing the affordable units, and a step-by-step guide for the developer and municipality which describes the process for establishing and maintaining affordable units.**

We support this recommendation. Again, model bylaws that assist local communities in addressing local land use decisions enable the community to make reasonable choices. The ultimate authority for adoption of such a process should rest with the local community.

4. **The Zoning Act should specifically allow municipalities to enact zoning provisions permitting housing density bonuses as a matter of right.**

We support this recommendation when the decision is made by the local community.

MIXED USE DEVELOPMENT PROJECTS

Some cities and towns view residential housing development and commercial/industrial development in isolation, and do not consider the creation of mixed use zoning districts. With the recent phenomenon of the corporate campus and other large office-type developments, it appears that the developments would be ideally suited for the creation of the New England village style of development whereby commercial development can be surrounded by (or interspersed with) residential housing at all income levels. Given that the lack of affordable housing is a factor in out-of-state companies declining to move to

the Commonwealth, several actions could encourage these companies to relocate to Massachusetts.

Recommendation

2. **The Commonwealth should provide incentives to companies looking to relocate to the Commonwealth and/or looking to develop corporate campuses to create housing to complement the commercial development. Such incentives could include enhanced tax increment financing which could be expanded to include housing creation as part of a mixed-use development package. Other financing incentives which link commercial development incentives with housing creation could expand housing opportunities, and result in the creation of a revenue neutral project. Such incentives could be targeted for developments which locate in existing commercial/industrial areas as well as areas located adjacent to mass transit corridors.**

We support this recommendation, and in fact encourage this type of planning.

2. **Allow the abandoned building tax credit to be used to encourage the redevelopment of urbanized blighted areas into new neighborhoods.**

We support this recommendation and again encourage this type of planning so long as the "new neighborhoods" include housing for all income levels, not only our lowest-income citizens.

BROWNFIELDS GRANT, LOAN, AND TAX PROGRAMS

Over the past several years, particularly since the enactment of the hazardous waste brownfields amendments to Chapter 21E, the Commonwealth has created a whole menu of financing, grant and tax incentive programs designed to encourage the redevelopment of urbanized brownfields contaminated by oil and/or hazardous materials. The key focus of these Brownfields programs, as administered through the Governor's Office of Brownfields Revitalization, has been commercial/industrial development and related job creation.

Recommendation

Where brownfields are suitable for residential development, authorize such housing projects as eligible for state brownfields programs and related incentives to redevelop urbanized areas into housing for all income levels. For example, subsidized environmental insurance can provide incentives for redevelopment of housing and the cleanup of hazardous materials. The Brownfields Tax Credit and

Municipal Tax Abatement programs would also provide incentives to both remediate contamination and create additional housing opportunities.

We support this recommendation and encourage this type of planning, so long as the housing is truly developed to serve "all income levels".

URBAN REDEVELOPMENT CORPORATION

Urban redevelopment corporations are private, limited dividend entities which are created under Chapter 121A and 760 CMR 25.00 to develop residential, commercial, recreational, historic or industrial projects in areas which are considered to be blighted or substandard. The urban redevelopment corporation may not undertake more than one project nor engage in any other type of development activity. The corporation bears the responsibility for planning and initiating the project and owns the project throughout its existence. Chapter 121A authorizes the exemption of a project from real and personal property taxes, betterments and special assessments, and allows the project developer to exercise the power of eminent domain to assemble a development site in specified circumstances. By allowing the tax exemptions, urban redevelopment corporations act as catalysts for development in areas with high property tax rates. The reason Chapter 121A corporations have not recently been used for the creation of affordable housing is that by law, the 121A entity may earn no more than an 8% return on investment, and any excess profits (after all eligible deductions) must be returned to the municipality up to the level of tax that would have been assessed if the property were to include a non-121A entity.

Recommendation

Amend Chapter 121A to increase the return on investment to that permitted under certain programs under Chapter 40B (i.e., 20% of development costs for non-rentals, and 10% of equity for rental housing).

We support this recommendation and encourage this type of planning.

REGIONAL HOUSING SUPPLY PLANNING

Increasing and facilitating housing production should be examined from a regional perspective. Planning for housing in regions or sub-regions should be supported by the Commonwealth. Regional housing development decisions that are guided by the housing market, demographic conditions, the area's economy, and available or planned infrastructure target the areas where housing development should occur, prevents sprawl and encourages more efficient development. Regional planning agencies can serve as catalysts and conveners of regional planning for housing.

Recommendation

In addition to supporting the planning efforts supported by Executive Order 418, the Commonwealth should examine the applicability of regulatory tools, such as those of the Cape Cod Commission, as a way to direct housing production to areas of greatest need, while protecting natural resources and assuring an adequate public transportation network and infrastructure for the housing to be built.

We support this recommendation and encourage this type of planning.

"MINORITY REPORT" TO THE BARRIERS TO HOUSING COMMISSION
REPORT OF THE ZONING SUB-COMMITTEE

Introduction

This "Minority Report" to the Barriers to Housing Commission Report of the Zoning Sub-Committee is submitted on behalf of those members of the Zoning Sub-Committee who did support the vast majority of recommendations found in the final report. However, we feel that some of the Sub-Committee's recommendations did not go far enough in identifying and proposing recommendations for the removal of unnecessary barriers to housing, or needed further clarification as to purpose which was not readily apparent in the final Sub-Committee Report. This Minority Report also provides commentary on the Minority Report submitted by Thomas Broderick, et als. (the "Broderick Minority Report") in order to address policy issues raised therein, and to clarify certain matters which did not appear to be clearly understood by the authors of the Broderick Minority Report. We apologize for the timing of the filing of this Minority Report, but we felt it was necessary to respond to both the Broderick Minority Report, and to the Department of Environmental Protection's October 1, 2001 comments on the Zoning Sub-Committee Report (a copy of which we received from the DEP on October 12, 2001), which prompted the following commentary and response in order to clarify the position of several members of the Zoning Sub-Committee.

It is important for the Special Commission to understand that the recommendations of the Zoning Sub-Committee, including the Sub-Committee members noted below, are recommendations which are largely procedural and which are proposed in a manner so as not to impact environmental protection, rights of public participation, or municipal home rule authority. While we understand that municipal officials are very frequently concerned with the erosion of local decision-making authority, the Subcommittee had extensive, constructive discussion over the need for balancing home rule authority with the Administration's policy objective of removing certain barriers to housing creation at all income levels.

For purposes of clarity, we have revised the format of the Sub-Committee Report to enable the reader to identify and compare the recommendations of the Sub-Committee, the authors of the Broderick Minority Report, and this Minority Report. **The text which is underlined and in bold print identifies our recommendations or commentary,** the "standard text" and text in **bold print** is the Majority view**, and the *"bold italics" print identifies the view in the Broderick Minority Report.***

We also stress that the recommendations in the Sub-Committee Report were based upon the collective experience of developers, lenders, community leaders, municipal officials and others actively involved in the development community

throughout the Commonwealth, and we therefore strongly disagree with the statement in the Broderick Minority Report that the Sub-Committee Report included "much anecdotal evidence [which is] simply not true throughout the Commonwealth." While we believe the goal of the Subcommittee (including the authors of this Minority Report), and the Governor is the elimination of barriers to housing creation to the point where only isolated, anecdotal circumstances arise, we believe that the drastic undersupply of housing in the Commonwealth speaks for itself. Moreover, several members of the Sub-Committee suggested that the Sub-Committee was overstepping the Barriers Commission's directive, or had considered matters which the Sub-Committee was not authorized to review. While we disagree with those members of the Sub-Committee who feel that way, we feel the Administration is more interested in identifying the barriers and resolving them rather than limiting or confining the discussion to matters strictly within the confines of the Zoning Sub-Committee since both zoning and subdivision control, as well as local wetlands bylaws and state wetlands regulations and policies, are very much interrelated.

Moreover, we understand that some of the recommendations in the Sub-Committee Report and this Minority Report may be subject to significant political opposition. The authors of this Minority Report fully understand these potential challenges to proposals for significant policy changes. We are also of the view, however, that unless the major zoning and wetlands regulatory barriers are identified and are at least "put on the table," we would be doing a disservice to the full Barriers Commission and current Administration by failing to identify these barriers or treating such barriers as if they did not exist because they do not have an easy political and/or legal solution. As you will discover below, solutions to removing some barriers are much easier than others. Clearly, some existing barriers to housing creation will need much more extensive evaluation. For example, one of the more significant barriers to housing creation is the procedural mechanism by which wetlands decisions on the state and local level are appealed and handled through the appeals process. There is no doubt that the resolution of this procedural barrier is quite complex but merits further examination, given the view of many members of the Sub-Committee that the current dual appeals process is unnecessarily complex and results in a very substantial barrier to housing creation.

Lastly, we disagree with the contention that the housing problem is strictly one of the need to create low or moderate income housing. When applied to the basic economic concept of supply and demand, an increase in housing supply will, in general, reduce housing costs. The housing crisis has extended far beyond those who can benefit from affordable housing programs, and now impacts the middle class wage earner who earns in excess of the median household income level.

We hope that the full Barriers Commission will find our comments both thoughtful and helpful in addressing the many of the issued raised by the many talented and energetic participants on the Zoning Sub-Committee.

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Former Chairman, Wetlands, Waterways and Water Quality Committee, Boston Bar Association

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The Zoning Sub-Committee of the Barriers to Housing Commission met 11 times from May 2 to August 1 to examine land use regulatory issues affecting housing production. The Sub-Committee represented many diverse interests including both for-profit and non-profit developers, banks, municipalities, and local and regional planners.

Several themes emerged from the Sub-Committee's discussions:

(15) localities are concerned that more housing will add to municipal service burdens and costs;
(16) the Commonwealth must take a more proactive role in providing financial incentives for housing development;
(17) there is a need to encourage municipalities not to enact unnecessary regulations that increase housing costs;
(18) there is a need to make legislative changes to deal with procedural problems that unnecessarily delay housing development and increase housing costs;
(19) there are available tools for responsible planning and zoning such as cluster development, transfer of development rights and density bonus provisions which could increase housing supply;
(20) there are newer avenues for growth and development, such as brownfields redevelopment and mixed use developments, which may make better use of land in developed areas; and,
(21) the Commonwealth must encourage both local and regional planning for housing.

Given the diverse composition of the Sub-Committee, not all members supported all recommendations. However, the Sub-Committee believes that the report represents the combined best efforts of its membership to bring the immediate need to increase housing production to the forefront. The report makes findings and recommendations in the following areas for the Commission's consideration:

a. Municipal Cost Burden
b. Density Regulations
c. Growth Control Bylaws
d. Municipal Fees
e. Subdivision Control Regulations
f. Local Wetland Protection Bylaws
g. Appeals Process
h. Density Bonus Regulations
i. Mixed Use Development Projects
j. Brownfields Grant, Loan and Tax Programs
k. Urban Development Corporations
l. Regional Housing Supply Planning

Proposed Recommendations to Reduce Barriers to Housing Production

MUNICIPAL COST BURDEN

There is a common perception, sometimes justified, that new housing units create a fiscal burden on the local community. The actual burden is dependent upon the assessed values of new homes and the incremental cost for additional students and other services. In some communities, it is likely that high sales prices and assessed values of new homes may actually generate net revenue. However, some communities may have a negative impact based on school capacity, extent of infrastructure, and available services (e.g., public safety, public works and recreation programs).

To determine the validity and extent of the claimed fiscal burden, a uniform methodology for determining the "cost of services" must be established and accepted by all parties to the housing production equation, which can then be used to establish the "true" cost of new housing units. With this "cost of services" in hand, a program or combination of programs can be developed, whether subsidy or fee-based, to defray the impact.

Recommendation

The Commonwealth should establish a comprehensive model for local aid which, on a community by community basis, assesses the impact of new housing. Such a model may reallocate some portion of existing aid and establish a state local aid impact fund to defray the true impact of new housing construction on cities and towns.

Broderick Minority Report

We do not support this recommendation. However, we would support an incentive program for communities that are addressing their housing needs. We cannot support re-allocation of local aid, but we could support the establishment of a local aid impact fund to defray the true impact of new housing construction on cities and towns.

Minority Report

We agree with the Sub-committee recommendation.

DENSITY REGULATIONS

Density regulations, such as minimum lot area requirements, minimum frontage requirements and low density per acre requirements, are the most significant barriers to the production of housing in the Commonwealth. Density regulations in many communities have increased the competition for available smaller lots, dispersed development, wasted valuable land resources, and have increased the costs of public and

private services. Moderate income home purchasers are being excluded from communities because of land costs and the selling cost of existing homes, and are finding the available small lots selling at prices beyond their means.

Although the issue of density regulations must be addressed, the Sub-Committee does not believe that a viable solution to the problem lies in a blanket statutory prohibition on municipalities enacting density regulations such as minimum lot size requirements. Establishing mandatory density regulations is not an acceptable technique for increasing housing production. Not only is such a solution unfair to areas already fully developed, but in some cases the requirement of certain density regulations may be justified by topographic or soil conditions and should be continued if such land is to be developed at all. The Sub-Committee also recognizes that home rule means that a municipality has the right, through legislated authority, to determine the location, manner and type of development it will permit within its boundaries. The State Legislature has repeatedly upheld this concept in legislation relating to zoning and subdivision control.

The Sub-Committee concludes that the Commonwealth needs a more energized and focused effort for increasing housing production.

Recommendations

5. **The Commonwealth should encourage communities to use the 40B process as a way of increasing production of market housing as well as affordable housing. The Commonwealth should design programs that reward communities that use this process in a friendly manner by defraying the municipal costs incurred by increased housing production.**

Broderick Minority Report

We support this recommendation.

Minority Report

We support this recommendation.

6. **The Commonwealth should examine all existing housing programs to determine if there are ways they can be revised to further increase housing production. For example, DHCD should review the LIP Program to see if the current guidelines make it economically feasible for a developer to construct housing under that program. Proposed program changes should be widely disseminated to the municipal and development interests affected by such changes.**

Broderick Minority Report

We support this recommendation.

Minority Report

We support this recommendation.

7. **The Commonwealth should encourage local adoption of zoning regulations that support higher density housing near commercial and transit uses. Such actions could discourage sprawl and spread of development to "green" areas.**

Broderick Minority Report

We support this recommendation.

Minority Report

We support this recommendation.

6. **A committee should be established by the Legislature that includes local officials, developers, planners and housing advocates for the purpose of recommending programs, legislation and planning tools that will increase housing production in the Commonwealth. Such programs, legislation and planning tools should be available at local option so as to maintain local autonomy. In order to accomplish this aim, revenue sources and grant programs should be directed to those communities that use such programs, legislation and planning tools and work cooperatively with the Commonwealth in increasing housing supply.**

Broderick Minority Report

We support this recommendation.

Minority Report

We support this recommendation.

GROWTH CONTROL BYLAWS

The enactment of local bylaws which impose limitations on the number of building permits which can be issued in any one year, or which permit only a certain percentage of units in any one development to be constructed in one year, or which prohibit development for one or more years is resulting in significant barriers to housing creation

at all income levels. Most municipalities impose these growth controls in order to study infrastructure needs or to review zoning. Some municipalities, however, impose growth controls simply to severely curtail new development or redevelopment projects without a clear action plan to resolve or correct the particular growth issue. See Sturges v. Town of Chilmark, 380 Mass. 246 (1980); Collura v. Town of Arlington, 367 Mass. 881 (1975). Moreover, Executive Order 215 provides that the imposition of a moratorium may result in the loss of discretionary funding but it is unclear whether E.O. 215 has ever been enforced against a municipality. In exchange for financial assistance to communities exhibiting a greater municipal cost burden as a result of housing development, local building cap regulations should have limited duration and purpose. The Commonwealth's population is going to grow regardless of growth control by-laws. If, for example, 60 towns enact them, the remaining communities must then shoulder a disproportionate burden.

There are, at times, real issues confronting a municipality, in terms of water supplies, sewer capacities, or school enrollments, which need to be addressed. However, these issues are identifiable and resolvable within a predictable horizon. Therefore, growth or permit controls should be substantially limited in their enactment, scope, and duration, with specific thresholds for implementation and municipal action to resolve the concern leading to the imposition of controls. Case history in the Commonwealth has shown that municipalities that enact these permit restrictions rarely, if ever, remove them from their bylaws, but rather continually renew them and frequently further restrict the number of units to be allowed annually, even after correcting water or sewer issues, or building new schools to address the student enrollment issues.

Recommendations

5. **Any municipal growth control by-law must: a) identify a specific problem(s) and include a reasonable stated duration; and b) contain a strategic plan to address the problem(s). The plan, which must be approved by DHCD, shall address the specific problem(s) and propose a timetable for solving the problem(s). Should the community seek to extend the bylaw for another duration, the community must revise its plan to explain the rationale for additional time and submit the revised plan to DHCD for approval.**

Broderick Minority Report

While this recommendation is a good idea and we support programs that require ALL growth control by-laws to identify problems and contain strategic plans for solutions, we note that it erodes local community control when a state agency must approve of it. How about DHCD "review" rather than approval? There is also the presumption that some issues may be resolvable by a local community when only a regional solution will solve them. Also, community character is not something that is resolvable by adhering to a specific timetable, it is a continuing process and would require continuous revisions to a plan. We do not support this recommendation.

Minority Report

While we support this recommendation, we feel that there must be some mechanism to ensure that a municipality proposing growth controls does so in a reasonable manner and undertakes measures to resolve the problem within a reasonable amount of time. For example, some municipalities limit the number of building permits for new dwellings units to 20 to 30 permits per year which the authors feel is entirely unreasonable since the particular municipality must have known of the infrastructure limitations for an extensive period of time (without properly reacting) to impose such a drastic growth control measure. We feel that an initial period of two years is a reasonable amount of time in most cases to both study the problem leading to the need for the growth control and to propose mechanisms through Town Meeting or the City Council to deal with such issues. There is no question that some issues (either local or regional) need more than two years to plan and implement such as wastewater facilities planning. However, we also believe that poor municipal planning should not be rewarded by allowing a municipality to impose growth controls which (but for poor planning and some foresight) could have resulted in the avoidance of the need for the growth control in the first place. We feel that a balanced approach to growth control would include DHCD approval to ensure that a municipality will proactively deal with the particular growth control issue. We acknowledge that the two-year growth control time limit would not work in every situation, and for that reason, the municipality would be able to extend the growth control period as long as the DHCD determines that the extension is reasonably required to substantially resolve the particular problem which led to the imposition of the growth control measure. Lastly, community character is clearly important to municipal residents, and community character can and should be a priority and can be handled proactively with careful planning which could result in the avoidance of certain reactive growth control measures.

6. **Dwelling units of two bedrooms or less should be exempt from growth control measures enacted based on municipal finance concerns as there are likely to be few children living in these types of units, but they are vitally needed for young adults and seniors.**

Broderick Minority Report

We do not support this recommendation. Many families of more than 3 members are unfortunately forced to occupy two bedroom units. There are in fact likely to be numerous children in these types of units. Let's focus on providing adequate family housing rather than exempting one and two bedroom units and thus creating housing for young adults and senior at the expense of family housing.

Minority Report

We concur with this recommendation. There is a significant lack of housing for both younger professionals and seniors for maintenance-free, apartment living. Many of these individuals cannot afford to purchase a home, or cannot find appropriate housing opportunities. Rental rates have grown dramatically to the point where such rates form a barrier similar to barriers for those seeking to purchase a home. Families with children are not the primary residents for these types of units, and to deny housing opportunities because children may live in such units is a sad commentary.

MUNICIPAL FEES

Section 53G of GL c. 44 provides that any city or town provide rules for the imposition of "reasonable fees" for the employment of outside consultants. Many times, the amount of review fees accrued by the outside consultant in its review of a project design may exceed what is reasonably necessary to review a project. Moreover, some municipalities provide an applicant only one choice of review agent when at least four choices would be reasonable. Further, some municipalities charge permit fees that are well in excess of the reasonable cost in administering the permit program.

Recommendation

7. **Section 53G of Chapter 44 should provide clear standards for the retention of outside review consultants by allowing the developer a choice of not fewer than four review consultants. To avoid the appearance of a conflict and using the Conflict of Interest Law, MGL, Chapter 268A, as a guide, it is recommended that the list cannot include an individual who has worked for the developer in the past year and that the selected consultant must agree not to work for the developer for at least one year after the conclusion of the review. In addition, Section 53G of Chapter 44 should provide an administrative appeal to the city council or board of selectmen on the reasonableness of the scope of work to be performed by the consultant, and the reasonableness of the consultant costs to be expended on the review of a project.**

Broderick Minority Report

We do not support this recommendation. Again local control is threatened. The local community should choose who will review applications before its boards, not the developer. Are we to allow the developers a voice in hiring a Town Engineer that many communities are fortunate enough to employ to review not only public projects but also development applications?

Minority Report

We strongly support this recommendation for a number of reasons. First, we interpret this recommendation to permit a municipality to have complete autonomy in selecting each of the review consultants which would be included on a list of the municipalities' recommended consultants, so local control is entirely preserved. The only choice the project proponent would have is the selection of one of those four consultants. Second, a simple administrative review mechanism as that proposed by the Sub-Committee would serve to ensure that the scope of work and related costs as proposed are reasonable and commensurate with the size of the proposed project. It is the opinion of the authors of this Minority Report that the administrative review process would be rarely used except in extreme circumstances since the proponent is unlikely to want to suffer delays in project review to challenge a patrticular scope of review fee unless the scope or related costs for such review we re considered significantly out of line for the type of project. Nevertheless, the authors of this Minority Report feel the existence of this administrative process is an essential tool to ensure the reasonableness of outside consultant review.

8. **If the recommendation above is enacted by the Legislature, then Section 53G of Chapter 44 should also authorize conservation commissions to impose reasonable fees for the employment of outside consultants.**

Broderick Minority Report

We do not support this recommendation unless local choice is retained.

Minority Report

See Minority Report comments on Recommendation # 1 above.

9. **DHCD should develop a model outside consultant review bylaw that can be readily adapted by a municipality.**

Broderick Minority Report

We support this recommendation since models are always of value to a community in determining for itself the various means of accomplishing its goals.

Minority Report

We support this recommendation since we believe reasonable municipal boards or commissions will desire to adopt a bylaw that provides a balanced approach to the retention of outside review consultants for project review.

A tax has been defined as "an enforced contribution to provide the support of government." United States v. Tax Comm'n of Miss., 421 U.S. 599 (1975). In Massachusetts, a community may not levy, assess or collect taxes without the permission of the General Court. The distinction between a fee and a tax was discussed by the court in Emerson College v. Boston, 391 Mass. 415 (1984). The court concluded that the imposed charge by the city, which produced revenue for allocation to the general police and fire services, constituted a tax to defray the cost of a public benefit rather than a fee payable for a benefit limited to the owners of a buildings. In deciding Emerson, the court noted that fees share three common traits that distinguish them from taxes. First, they are charged in exchange for a particular government service that benefits the party paying the fee in a manner not shared by other members of society. Second, they are paid by choice in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge; and third, they are collected not to raise revenues but to compensate the governmental entity providing the service for its expenses.

There have been instances where imposed charges have been upheld as valid fees. For example, in Southview Co-operative Housing Corp. v. Rent Control Board of Cambridge, 396 Mass. 395 (1985), the court concluded that charges assessed against landlords by the Rent Control Board of Cambridge in connection with petitions for individual rent adjustments were valid fees. In Commonwealth v. Caldwell, 25 Mass. App. Ct. 91 (1987), the court found that a mooring and slip fee assessed to boat owners by a city's harbormaster pursuant to a municipal ordinance was a valid fee and not a tax. In both cases the court determined that the revenues raised directly compensated the government for the cost of providing the service.

Municipalities may be imposing fees that exceed the cost of the service being provided.

Recommendations

5. **Local permit and approval fees must be based upon the reasonable costs of permit program administration, and cannot be used as a mechanism to generate revenue in excess of the costs of administration for a particular board, commission or department. Communities should be required to provide a rationale for the fees charged, demonstrating the relationship between such fees and the cost of providing the particular service through the particular board, commission or department. Any application or permit request should be governed by the fee schedule in effect at the time of the submission of the application or permit request.**

Broderick Minority Report

We support this recommendation since all communities' fees should be based on reasonable costs of permit program administration. We caution that the result of such a program may result in a realization of increased fees to developers.

Minority Report

Several members of the Sub-Committee initially considered this issue to be an example of an anecdotal, isolated incident which rarely occurs in Massachusetts. However, the disclosure of the common nature of this practice in a July 26, 2001 Boston Globe article indicates the practice is a common occurrence in Massachusetts. For example, the above-referenced Boston Globe article stated that "many municipalities rake in hundreds of thousands of dollars each year in permit fees collected by local building departments … [and] … most permit revenue is fed into a city or town's general operating fund." For example, the Boston Globe article states that in FY2001, a certain town building department incurred $74,974 in program administration expenses but generated $1,128,136 in permit fees. To continue such a practice creates a housing affordability barrier by unnecessarily increasing a developer's housing costs which, in turn, are passed on to the homebuyer in the form of higher housing prices.

6. **When review consultants are to be employed by the community, a developer should have a choice of not fewer than four review consultants. To avoid the appearance of a conflict and using the Conflict of Interest Law, MGL, Chapter 268A, as a guide, it is recommended that the list not include an individual who has worked for the developer in the past year and the selected consultant must agree not to work for the developer for at least one year after the conclusion of the review. In addition, there should be a process for administrative appeal to the city council or board of selectmen by a developer to permit the developer to contest the reasonableness of the scope of work to be performed by the consultant, and the reasonableness of the review consultants cost to be expended on the review of the project.**

Broderick Minority Report

We do not support this recommendation. Again local control is threatened and it is not proper for the developer to choose who will review his/her plans.

Minority Report

See Minority Report comments on Municipal Fees Recommendation # 1 above.

SUBDIVISION CONTROL REGULATIONS

Excessive road and infrastructure design and construction standards add substantial cost and create a significant barrier to creation of housing. Reasonable engineering standards can be established for infrastructure needs that can generally reflect public safety, health and environmental priorities.

Broderick Minority Report

We note that MGL c. 41 is outside the review of this Sub-Committee on Zoning, however we understand that subdivision control and zoning are intertwined and will ultimately affect overall housing costs. Further study is needed.

Minority Report

The promulgation of local regulations under the State Subdivision Control Law is certainly necessary to ensure health and safety measures are achieved, and help to ensure that a community's character is preserved. Subdivision control is intertwined with zoning regulation. At times, however, local subdivision control regulations can create a significant barrier to housing creation by imposing unreasonable design standards and/or resulting costs for road layout and other design specifications which, in turn, can significantly and unnecessarily increase housing costs.

Recommendations

9. **A working group of stake holders, including developers, municipal officials and engineering consultants should be formed for the purpose of recommending suggested construction standards that incorporate various conditions that would affect design and use of the roadways. This committee should also prepare a guidebook containing the suggested standards for distribution to cities and towns.**

Broderick Minority Report

We support this recommendation if only a handbook for local communities is the result. Again, the more resources a community has to make an informed decision on local

development, the better off the Commonwealth will be. The list of stakeholders should be expanded to include environmental planners.

Minority Report

We agree with the Sub-Committee recommendation and the Broderick Minority Report.

10. **The Department of Housing and Community Development shall include adoption of the suggested construction standards as an action that can be used by a community to qualify toward obtaining housing certification pursuant to Executive Order 418.**

Broderick Minority Report

We support this recommendation but note that there would need to be a provision to allow for alternatives. "One size fits all" does not work. Local character will be lost if a community is forced to a standard in order to qualify for funding.

Minority Report

We agree with this recommendation, and agree with the Broderick Minority Report that alternative construction standards should be explored so that minimum standards are achieved to ensure that the purposes of the subdivision control law are satisfied.

LOCAL WETLAND PROTECTION BYLAWS

Broderick Minority Report

While this report states that wetland regulation is a significant barrier to housing, it should be recognized that wetlands SHOULD be a "limiting factor" to any development project. PROTECTION OF THE ENVIRONMENT MUST GO HAND IN HAND WITH PROVIDING HOUSING. In fact, this discussion is outside of the purview of this Sub-Committee: Wetlands bylaws are not rules for zoning, but for environmental protection.

Minority Report

There is no question that wetlands protection should be a limiting factor to any development project, and that there is no question that reasonable local regulation of wetlands is important to preserve unique wetlands resources. Local wetlands

regulation, however, has very frequently been used as a "zoning-type" control through the imposition of no-build or non-disturbance setbacks, or through the imposition of minimum contiguous buildable upland requirements in many zoning bylaws. While we agree that such restrictions are appropriate in many circumstances for the protection of sensitive receptors for purposes such as public water supply watershed protection or wellfield recharge, a "one-size fits all" approach does not always serve to protect wetland interests. In fact, the imposition or arbitrary setbacks may have the opposite effect by resulting in the need for the development of more land to satisfy wetlands regulatory and/or zoning requirements. As a result of these measures and other measures which result in the need for large lot zoning, developed land now has less than one half of the population density of developed land in 1950. Further, as noted in the "Bringing Down the Barriers Report," the amount of developed land increased at a rate greater than six times population growth between 1950 and 1990. See Policy Report—Bringing Down the Barriers: Changing Housing Supply Dynamics in Massachusetts," Administration and Finance (p.22). While admittedly the creation of more restrictive local wetlands protection bylaws is only one reason for the increased consumption of land, it is a measure which has contributed to the need for larger lot zoning which, in turn, has promoted suburban sprawl.

A significant barrier to the development of housing is how wetlands are regulated in the Commonwealth. A municipality's power to regulate wetlands is shared jointly with the Commonwealth. Specifically, wetlands are regulated both under the State Wetlands Act and local wetlands bylaws enacted pursuant to the State Wetlands Act. There are two major reasons why this dual regulatory authority needs to be addressed.

First, municipalities have enacted wetland bylaws covering issues that are beyond the DEP's regulatory authority established under the Wetlands Protection Act. Some local wetlands bylaws have also introduced certain "no-build" and "non-disturbance" areas located either within a wetlands resource area buffer zone or beyond the buffer zone and in upland resource areas in excess of what may be necessary for environmental protection. In addition, some local wetlands bylaws include stormwater management guidelines in excess of the DEP Stormwater Management Guidelines.

Second, dual authority to regulate wetlands creates a bifurcated wetlands appeal process. Appeals under the State Wetlands Act are governed by Chapter 30A, the State Administrative Procedures Act, and administered through the Adjudicatory Rules and Wetlands Regulations. These appeals are made initially to the DEP regional office, then through the Office of Administrative Appeals, and finally to Superior Court. However, appeals of orders issued under a local wetlands bylaw is by complaint to Superior Court in the nature of *certiorari* filed within 60 days after the issuance of a decision.

Similar to the Building Code, a standard and permitting/enforcement method for environmental, conservation, and health concerns needs to be established.

Environmental, conservation, and health standards are necessary but they need to be uniform, predictable, based on scientific or engineering fact, and have some compelling public benefit to their enactment.

Recommendations

1. The State Wetlands Act should be the primary authority for the regulation of Wetlands in the Commonwealth. A municipality should have the ability to enact more stringent regulations if based on science and approved by the DEP.

Broderick Minority Report

Our view of this recommendation is that communities ALREADY do this. If there are no local regulations, then DEP regulations are automatically in place. Local regulations ARE based on science. Local authority to set standards more strict than state regulations has been upheld in the courts. We do not agree that DEP should hold final say over local bylaws. We see no need for this recommendation.

Minority Report

The authors of this Minority Report agree that many municipalities do enact wetlands regulations based upon science. On the other hand, the authors believe the intent of this recommendation is the creation of a uniform code of wetlands standards at the state level, and permitting local municipalities to enact more stringent wetlands bylaws only for compelling reasons based upon unique local conditions.

As such, the authors propose the following recommendation:

> **Require that the State Wetlands Protection Act and Regulations serve as a uniform code. Proposed local wetlands bylaws, which are more stringent than standards described under the State Wetlands Act and Regulations, shall be based on generally-recognized scientific principles and include regulation of subject matter defined in the State Wetlands Act and Regulations. In order to enforce these requirements, establish a wetlands bylaw review process similar to that formerly proposed to be established under Title 5 of the State Environmental Code (310 CMR 15.000) which would require local conservation commissions (or municipalities), prior to bylaw enactment, to provide the DEP with copies of proposed local bylaws, including generally-recognized scientific justification for their enactment, and the unique local conditions meriting a deviation from the uniform code. The Department of Environmental Protection, in turn, should be charged with reviewing the proposed bylaw to ensure that such bylaws are consistent with the state regulatory requirements, are scientifically justified, and are based upon unique local circumstances. Such review procedure should be**

instituted regardless of whether the local wetlands bylaw is enacted under home rule authority or otherwise.

We acknowledge this proposal is a radical departure from the current wetlands protection regulatory scheme, and that the proposal would face significant political opposition. This recommendation will also result in the need for examination of certain legal issues regarding potential impacts to existing local wetlands bylaws enacted under home rule authority. On the other hand, the consolidation of the wetlands review process would lead to more streamlined and consistent review of potential project impacts to wetland resources, including unique wetland resources significant to local concerns.

2. In communities where local wetland bylaws have been enacted, the current dual appeal process should be combined by creating a consolidated appeal process to be administered by DEP.

Broderick Minority Report

We do not support the eroding of the appeal process as it stands today. We see no value in making it less rigorous with respect to environmental protection.

Minority Report

This second proposal is linked to the first Minority Report recommendation above. We also feel that the Broderick Minority Report misses the point since a more disjointed process does not result in more environmental protection but results in a more expensive process with no commensurate increase in environmental protection. It is well-recognized that the current dual appeals process for appeals of approvals issued under the State Act and local bylaws is a very disjointed process which results only in unnecessary project delay and does not result in any increased environmental protection unless one considers a 2-3 year project delay a method of environmental protection because a project is abandoned or not constructed because of the carrying expense to the project proponent. There is no question that this dual appeals process creates one of the most significant barriers to housing creation due to the lengthy bifurcated process involved when a wetlands appeal involves an appeal to the Department and to Superior Court. It is acknowledged that the separate legal authority for appeals under the State Wetlands Protection Act (pursuant to M.G.L. c.30A) and local bylaw (by certiorari to Superior Court) presents challenging legal and policy issues to the proposed combination of both appeals processes under the current dual wetlands review process. On the other hand, the authors feel a combined appeals process would certainly work well with a uniform wetlands protection act at the state level as recommended above. As noted in the introductory comments to this Minority Report, we believe this recommendation deserves more significant evaluation to determine whether a statutory mechanism can be created to combine the appeals process, to create a

uniform standard of review, and to create uniform appeal periods. We all recognize the problem and the barrier it creates to housing creation, but the recommended solution to this problem will require much more substantive analysis.

It is also recommended that the DEP review their policies relative to appeals and consider the following suggestions.

Broderick Minority Report

While the majority view was to forward these comments to DEP, we see no value in making these recommendations which dilute the appellants ability to appeal.

Minority Report

The Broderick Minority Report misses the point. The authors of this Minority Report simply desire to cut down on the number of frivolous appeals which routinely occur. It is well-known in the regulated community that the easiest and least costly method by which a project can be delayed is by appealing the issuance of a wetlands order of conditions pursuant to the state wetlands protection act. Because the Department does not strictly adhere to its own regulatory timeframes or strictly enforce standards which appellants must meet to satisfy minimum criteria for appeals due to resource limitations, the anti-development community has taken advantage of this well-known delay tactic which imposes significant barriers to both housing creation and housing costs.

1. **Revise the DEP's Expedited Review Policy to permit expedited review of significant housing development opportunities such as large multifamily projects and/or affordable housing projects.**

Minority Report

We support this recommendation. Since the administration's stated goal is to reduce barriers to housing development, the Department should expedite significant housing opportunities such as housing approved as part of the Chapter 40B and Chapter 121A processes. We agree with the Department's comments that the expedited review process could be self-defeating if expedited review applied to all housing projects, so we recommend that the policy apply to the types of housing most urgently needed, such as moderate income housing or other housing created under the Chapter 40B and Chapter 121A processes.

2. Eliminate several of the appeal routes/procedures provided under the Adjudicatory Rules that are not specifically based upon the Wetlands Act. For example, a person wishing to prolong an adjudicatory appeal may file a "motion for reconsideration" of the adjudicatory appeals decision issued by the administrative law judge ("ALJ") even though such request has no merit. See 310 CMR 1.01(14)(d). Such a request may significantly add to the delay in obtaining a "final" approval and has rarely, if ever, been successful in reversing a decision issued by the ALJ.

Minority Report

We support this recommendation because we feel that a more simplified appeals process should be implemented. While the Department is currently reviewing methods by which to streamline "trial-like" procedures, our concern really lies with the number of appeal routes (and related procedural techniques) provided under the State Wetlands Regulations and Adjudicatory Rules. For example, a wetlands order of conditions can be appealed to the Department's regional office through a request for superseding order of conditions which can take up to four or more months to be resolved. Subsequently, the superseding order can be appealed through a request for adjudicatory hearing which involves a lengthy review process. Thereafter, an appeal of a final determination in the adjudicatory appeals process can be made to Superior Court. Moreover, the authors are aware of circumstances where it has taken no less than five months for the Department to assign an adjudicatory appeal to an administrative law judge. Although the Department's time standards mandate that adjudicatory appeals must be resolved within one year, the appeals process is more complicated than it needs to be.

11. Mandate that appellants strictly comply with the specific regulatory part of the request filed.

12. Require appellants to post a bond when appealing to reduce the number of frivolous appeals.

13. Limit issues raised in an appeal to those expressly identified in the appeal, and preclude new issues for appeal which are gathered from those not a party to an appeal at DEP site visits or through ex parte contact with the DEP.

14. Mandate that strict timeframes be adhered to by both applicants and appellants under penalty of dismissal with prejudice, and without the ability to submit new information beyond regulatory timeframes.

Minority Report

We support these recommendations.

APPEALS PROCESS

It is very inexpensive for communities and abutters to appeal subdivision approvals and tie up housing projects for years, yet costly for developers to litigate arbitrary decisions by boards. Currently appeals of zoning by-laws and subdivision decisions can be appealed to Superior Court. Under current law such appeals are not given precedence and can take up to one to three years for a final decision. Only the largest building companies have the cash flow to support the costs for these suits.

In addition, the State Zoning Act includes an obscure provision relating to the posting of bonds and the awarding of court costs resulting from appeals of approved subdivision plans. Specifically, Section 17 of the Sate Zoning Act (MGL c.40A, s. 17) provides that "the court shall require non-municipal plaintiffs to post a surety or cash bond in a sum of not less than two thousand nor more than fifteen thousand dollars to secure the payment of such [court] costs in appeals of decisions approving subdivision plans" … and that all appeals under Section 17 … "shall have precedence over all other civil actions and proceedings." Further, all the provisions of Section 17 relating to the posting of bonds and the awarding of court costs should be more broadly applied to the appeals of special permits in addition to appeals of approved subdivision plans.

Moreover, the appeals process gives an unreasonably powerful tool to anti-housing interests, since arbitrary and frivolous appeals can be lodged with little or no basis, cost or risk. The appeals process needs to be corrected and clarified so that it is a balanced and efficient resolution to genuine issues.

Recommendation

9. Section 81BB of the State Subdivision Control Law should include language identical to Section 17 of the Zoning Act with respect to requirements for the posting of bonds and the awarding of court costs when a party appealing a decision approving a subdivision plan acts in bad faith or with malice in making the appeal to the court.

Broderick Minority Report

We do not support this recommendation since it erodes the public process.

Minority Report

The Broderick Minority Report misses the point. The public process would be significantly enhanced were those appealing decisions on frivolous grounds given a disincentive to do so by allowing a neutral arbiter (a judge) to award court costs when a party appealing a decision approving a subdivision plan acts in bad faith or with malice in making the appeal to the court.

10. **Section 17 of Chapter 40A should mandate the court to impose on non-municipal plaintiffs the requirement to post a surety or cash bond in a sum between $2,000 and $15,000 to secure the payment and award of court costs to the applicant in appeals of decisions approving special permits when the court determines the appellant acted in bad faith or with malice in making the appeal to the court.**

Broderick Minority Report

We do not support this recommendation since it too erodes the public process.

Minority Report

See the Minority Report comments on Recommendation # 1 above.

11. **In addition, or as an alternative, to requiring appellants to post a surety or cash bond, Chapter 40A, Section 17 and Chapter 41, Section 81BB should provide the applicant with the right to file an immediate, special motion to dismiss an appeal of an approval of a special permit and /or definitive subdivision plan approval if the applicant feels it can demonstrate that the appellant acted in bad faith or with malice in making the appeal to the court. In such circumstances when the court grants such special motion to dismiss based upon its findings of bad faith or malice, the court shall award the applicant both costs and reasonable attorneys fees including those costs and fees incurred for the special motion and any related discovery matters.**

Broderick Minority Report

We do not support this recommendation since it too erodes the public process.

Minority Report

We support this recommendation since it only provides a disincentive to those who appeal an approval of a special permit and/or definitive subdivision plan in bad

faith or with malice. A party filing an appeal in good faith would not be concerned with sanctions such as those proposed pursuant to this recommendation.

12. **Senate Bill No. 810 of 2001 would amend MGL, Chapter 183 by giving precedence to any civil action or proceeding involving real estate permits. A real estate permit is defined as any authorization, certificate, building permit, license, variance or other approval issued by an agency, department, board, commission, authority or other governmental body or official of the Commonwealth or any city, town, or other political subdivision thereof to any person, firm, corporation, or other entity for the erection, alteration, repair or removal of a building or structure upon land. The Legislature should enact and the Governor should support this legislation or similar legislation that would expedite litigation involving residential construction.**

Broderick Minority Report

We do not support this recommendation since it too erodes the public process.

Minority Report

We support this recommendation since it attempts to prioritize, as a matter of policy, the elimination of barriers to housing by expediting court review of housing projects.

DENSITY BONUS REGULATIONS

Many cities and towns have enacted bylaws or ordinances that are designed to reward the developer with a density bonus in exchange for the set-aside of a certain number of affordable units. Unfortunately, the vast majority of these bylaws have gone unused because most of them are unworkable. Even if they were workable, developers are frequently confused about how to implement affordable housing restrictions.

Recommendation

5. **In order to encourage the use of the density bonus incentive to create additional units of affordable housing without having to go through the Chapter 40B process, DHCD should develop a model affordable housing density bonus bylaw package which includes: a model inclusionary housing**

bylaw, a model affordable housing restriction, recommended marketing and sales practices, recommended process for managing the affordable units, and a step-by-step guide for the developer and municipality which describes the process for establishing and maintaining affordable units.

Broderick Minority Report

We support this recommendation. Again, model bylaws that assist local communities in addressing local land use decisions enable the community to make reasonable choices. The ultimate authority for adoption of such a process should rest with the local community.

Minority Report

We support this recommendation but suggest that Chapter 40A be amended to expressly provide that if municipalities enact affordable housing mandates for conventional (non-Chapter 40B) residential projects, the municipality must provide density bonuses. The concern raised relates to recent legislative proposals to mandate the provision of affordable housing in housing developments of a certain size but without any density bonus to offset the monetary loss to the project proponent resulting from the mandate to create affordable units.

6. **The Zoning Act should specifically allow municipalities to enact zoning provisions permitting housing density bonuses as a matter of right.**

Broderick Minority Report

We support this recommendation when the decision is made by the local community.

Minority Report

We support this recommendation.

MIXED USE DEVELOPMENT PROJECTS

Some cities and towns view residential housing development and commercial/industrial development in isolation, and do not consider the creation of mixed use zoning districts. With the recent phenomenon of the corporate campus and other large office-type developments, it appears that the developments would be ideally suited for the creation of the New England village style of development whereby commercial development can be surrounded by (or interspersed with) residential housing at all income levels. Given that

the lack of affordable housing is a factor in out-of-state companies declining to move to the Commonwealth, several actions could encourage these companies to relocate to Massachusetts.

Recommendation

3. **The Commonwealth should provide incentives to companies looking to relocate to the Commonwealth and/or looking to develop corporate campuses to create housing to complement the commercial development. Such incentives could include enhanced tax increment financing which could be expanded to include housing creation as part of a mixed-use development package. Other financing incentives which link commercial development incentives with housing creation could expand housing opportunities, and result in the creation of a revenue neutral project. Such incentives could be targeted for developments which locate in existing commercial/industrial areas as well as areas located adjacent to mass transit corridors.**

Broderick Minority Report

We support this recommendation, and in fact encourage this type of planning.

Minority Report

We support this recommendation.

2. **Allow the abandoned building tax credit to be used to encourage the redevelopment of urbanized blighted areas into new neighborhoods.**

Broderick Minority Report

We support this recommendation and again encourage this type of planning so long as the "new neighborhoods" include housing for all income levels, not only our lowest-income citizens.

Minority Report

We support this recommendation, but as a matter of policy, we suggest that this tax credit be targeted for the type of housing which is of greatest need.

BROWNFIELDS GRANT, LOAN, AND TAX PROGRAMS

Over the past several years, particularly since the enactment of the hazardous waste brownfields amendments to Chapter 21E, the Commonwealth has created a whole menu of financing, grant and tax incentive programs designed to encourage the redevelopment of urbanized brownfields contaminated by oil and/or hazardous materials. The key focus of these Brownfields programs, as administered through the Governor's Office of Brownfields Revitalization, has been commercial/industrial development and related job creation.

Recommendation

Where brownfields are suitable for residential development, authorize such housing projects as eligible for state brownfields programs and related incentives to redevelop urbanized areas into housing for all income levels. For example, subsidized environmental insurance can provide incentives for redevelopment of housing and the cleanup of hazardous materials. The Brownfields Tax Credit and Municipal Tax Abatement programs would also provide incentives to both remediate contamination and create additional housing opportunities.

Broderick Minority Report

We support this recommendation and encourage this type of planning, so long as the housing is truly developed to serve "all income levels".

Minority Report

We support this recommendation, and encourage more expansive use of Brownfields program incentives. We note that many of the incentives are tied to job creation for the stated purpose of economic development. However, those same incentives should be expanded to encourage housing creation.

URBAN REDEVELOPMENT CORPORATION

Urban redevelopment corporations are private, limited dividend entities which are created under Chapter 121A and 760 CMR 25.00 to develop residential, commercial, recreational, historic or industrial projects in areas which are considered to be blighted or substandard. The urban redevelopment corporation may not undertake more than one project nor engage in any other type of development activity. The corporation bears the responsibility for planning and initiating the project and owns the project throughout its existence. Chapter 121A authorizes the exemption of a project from real and personal property taxes, betterments and special assessments, and allows the project developer to exercise the power of eminent domain to assemble a development site in specified circumstances. By allowing the tax exemptions, urban redevelopment corporations act as catalysts for development in areas with high property tax rates. The reason Chapter 121A corporations have not recently been used for the creation of affordable housing is that by

law, the 121A entity may earn no more than an 8% return on investment, and any excess profits (after all eligible deductions) must be returned to the municipality up to the level of tax that would have been assessed if the property were to include a non-121A entity.

Recommendation

Amend Chapter 121A to increase the return on investment to that permitted under certain programs under Chapter 40B (i.e., 20% of development costs for non-rentals, and 10% of equity for rental housing).

Broderick Minority Report

We support this recommendation and encourage this type of planning.

Minority Report

We support this recommendation and also encourage this type of planning which is designed to redevelop housing in urbanized areas.

REGIONAL HOUSING SUPPLY PLANNING

Increasing and facilitating housing production should be examined from a regional perspective. Planning for housing in regions or sub-regions should be supported by the Commonwealth. Regional housing development decisions that are guided by the housing market, demographic conditions, the area's economy, and available or planned infrastructure target the areas where housing development should occur, prevents sprawl and encourages more efficient development. Regional planning agencies can serve as catalysts and conveners of regional planning for housing.

Recommendation

In addition to supporting the planning efforts supported by Executive Order 418, the Commonwealth should examine the applicability of regulatory tools, such as those of the Cape Cod Commission, as a way to direct housing production to areas of greatest need, while protecting natural resources and assuring an adequate public transportation network and infrastructure for the housing to be built.

Broderick Minority Report

We support this recommendation and encourage this type of planning.

Minority Report

We support this recommendation and encourage the use of regional planning agencies as facilitators, so long as such use does not create an additional layer of permitting which could serve as a barrier to housing creation.

ADDENDUM TO MINORITY REPORT TO THE BARRIERS TO HOUSING COMMISSION REPORT OF THE ZONING SUB-COMMITTEE

Introduction

The following is an addendum to the "Minority Report" to the Barriers to Housing Commission Report of the Zoning Sub-Committee previously submitted by John T. Smolak and Thomas D. Zahoruiko in order to clarify an issue raised previously by the undersigned as part of the Zoning Subcommittee deliberations.

LOCAL WETLAND PROTECTION BYLAWS

A significant barrier to the development of housing is how wetlands are regulated in the Commonwealth. A municipality's power to regulate wetlands is shared jointly with the Commonwealth. Specifically, wetlands are regulated both under the State Wetlands Act, and under local wetlands bylaws enacted pursuant to municipal home rule authority. Most frequently, a municipality having a local wetlands bylaw will issue a single wetlands order of conditions for a proposed residential project pursuant to the State Wetlands Act and local wetlands bylaw.

Dual authority to regulate wetlands creates a bifurcated wetlands appeal process. Appeals of an order of conditions issued under the State Wetlands Act are governed by Chapter 30A, the State Administrative Procedures Act, and are administered through the Adjudicatory Rules and Wetlands Regulations. These appeals are made initially to the DEP regional office, then through the Office of Administrative Appeals, and finally to Superior Court.

Appeals of wetlands orders of conditions or permits issued under a local wetlands bylaw are by complaint to Superior Court in the nature of *certiorari* filed within 60 days after the issuance of a decision pursuant to M.G.L. c.249, §4, and review is limited to the record compiled during the local conservation commission hearing process.

Accordingly, information not previously introduced during the conservation commission hearing process may not be included as part of the record on appeal of a local wetland bylaw decision. As a result, any decision on an order of conditions issued by the Department of Environmental Protection on the same project cannot be introduced as evidence in the local bylaw appeal proceeding because that decision was not a part of the local conservation commission record. This mechanism effectively precludes the introduction of new evidence from a competent source, such as a DEP decision on the project, from being introduced as evidence in the Superior Court wetlands appeal proceeding.

Minority Report Recommendation

1. Section 4 of Chapter 249 should be amended to provide that appeals of decisions made pursuant to local wetlands bylaws shall be subject to de novo review.

Respectfully, submitted,

John T. Smolak, Esq., Partner, Peabody & Arnold LLP
Immediate Past Vice-Chairman, Merrimack Valley Planning Commission
Former Chairman, Wetlands, Waterways and Water Quality Committee, Boston Bar Association

Thomas D. Zahoruiko
Tara Leigh Development Company, LLC
National Director, National Association of Home Builders

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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JANE SWIFT
Governor

BOB DURAND
Secretary

LAUREN A. LISS
Commissioner

October 1, 2001

Mr. Donald Schmidt
Department of Housing and Community Development
One Congress Street, 10th Floor
Boston, MA 02114-2010

Dear Mr. Schmidt:

I am writing to you in your capacity as the Chairman of the Barriers to Housing Commission, Zoning Sub-committee and offer the following comments to the Proposed Recommendations to Reduce Barriers to Housing Production. The Department of Environmental Protection (the "Department") would like to extend our thanks to you for your ongoing effort in attempting to identify zoning barriers to housing construction in Massachusetts. While the Report of the Zoning Sub-Committee (the"Report") primarily addresses local obstacles to housing, some of the recommendations acknowledge the close relationship that exists between local wetland protection by-laws and the Commonwealth's Wetland Protection Act. As you know, the Department relies on local conservation commissions to implement the wetland regulations. As such, the Department has had extensive interaction and experience with conservation commissions in efforts to promote wetland protection. This experience serves as the basis for many of the attached comments.

Under the Local Wetland Protection Bylaws section of the recommendations, several recommendations are proposed which do not reflect earlier comments offered by the Department. The Department's positions on these issues are reiterated in the attached comments, which attempt to balance the charge of your committee with our efforts to protect the environment.

Recommendations

1. The State Wetlands Act should be the primary authority for the regulation of Wetlands in the Commonwealth. A municipality should have the ability to enact more stringent regulations if based on science and approved by the DEP.

Wetland bylaws are enacted under a separate legal authority, stemming from Home Rule powers under the Massachusetts' Constitution. A fundamental legal issue that must be addressed before this item can be seriously debated is: Can the legislature enact a law that will alter the existing rights and requirements contained in more than 150 existing home rule wetland bylaws? In other words, can the Legislature retroactively impose additional restrictions, appeal routes or other modifications of existing bylaws? It is almost assured that environmental organizations, and many municipal law experts, will oppose this recommendation.

While the recommendation acknowledges the opportunity for more stringent bylaws, it also implies that most bylaws are not based on science. In fact, more stringent local wetland by-laws are quite often supported by science. For example, in light of the recent National Academy of Sciences Report which critiqued the success of wetland replication efforts, a scientific argument can be made that the requirement for 2:1 mitigation is reasonable. In addition, no-build/ non-disturbance zone provisions in local by-laws can be justified based upon scientific literature on wildlife habitat requirements and the toll which cumulative impacts (including the incremental wetland fill by individual homeowners) have been shown to have on wildlife habitat. In sum, science typically supports the enactment of local wetlands bylaw where the state regulations are not protective enough. Contrary to assertions made in support of this recommendation, the current science on comprehensive wetland protection does support the concept of "no-build" and "non-disturbance" protective zones; such zones do not represent excessive measures in attempting to provide environmental protection.

2. In communities where local wetland bylaws have been enacted, the current dual appeal process should be combined by creating a consolidated appeal process to be administered by DEP.

As noted in the text supporting this recommendation, a dual wetland appeal process exists because of the separate local and state wetland protection processes. If adopted, this recommendation will result in a greater backlog in the Department administrative appeal process due to increased number of appeals and increased complexity of issues that the Department will have to grapple. The assumption of appeals of local bylaws would place a heavy administrative, technical, and legal burden on the Department, which would require significantly more resources. The Department and its Office of Administrative appeals will be required to debate issues beyond the scope of the Department's authority. The function of the Department's Administrative Law Judge is to "take any action authorized by MGL c.30A to conduct a just, efficient and speedy adjudicatory appeal, and to write a fair and impartial

decision for consideration and adoption by the Commissioner." 310 CMR 1.01(5). Their power does not to reach to issues derived from and pertaining exclusively to local law or the Home Rule Act.

The Wetlands Protection Act designates local governments (i.e. conservation commissions) as the first step in the process of wetland permitting review. In addition, under the Home Rule Act, communities may also elect to "police" issues of local concern, including wetland protection, by the enactment of a wetland bylaw. Unlike appeals of the state Wetland Protection regulations that are made to the Department's Office of Administrative Appeals, appeals of local bylaws are required to go to Superior Court. Lacking legislative authorization, the Department's appeal process cannot be expanded to include bylaw challenges. Under the Home Rule Act, municipalities may choose to regulate land uses (e.g. aesthetics or to protection wildlife and not simply wildlife habitat) beyond the Department's regulatory authority established in the Wetlands Protection Act.

In addition to the above recommendations, the sub-committee provided additional suggestions regarding changes to this Department's administrative appeals process. These recommendations, and the Department's comments, are as follows:

1. **Revise the DEP's Expedited Review Policy to permit expedited review of significant housing development opportunities such as large multifamily projects and/or affordable housing projects.**

Affordable housing could be incorporated quite easily into the existing policy, simply by inserting appropriate language in the policy to acknowledge the "affordable housing" constitute a public interest of the Commonwealth. But affordable housing should be the limit – perhaps tied to the 40B process. Adding "large multifamily projects", however, could conceivably be construed to include everything from million dollar waterfront condos and major subdivisions to and mixed-use developments. Such broad-based exceptions would soon swallow the policy.

2. **Eliminate several of the appeal routes/procedures provided under the Adjudicatory Rules that are not specifically based upon the Wetlands Act. For example, a person wishing to prolong an adjudicatory appeal may file a "motion for reconsideration" of the adjudicatory appeals decision issued by the administrative law judge even though such request has no merit. See 310 CMR 1.01(14)(d). Such a request may significantly add to the delay in obtaining a "final" approval and has rarely, if ever, been successful in reversing a decision issued by the ALJ.**

While the adudicatory hearing rules are being reviewed to streamline trial-like procedures (e.g motions for reconsideration), adjudicatory regulations provide that ALJs conduct a hearing de novo. As such, the Administrative Appeal Office often find this process necessary for them to add issues to "develop an adequate and comprehensible record of the adjudicatory appeal." 310 CMR 1.01(5)13.

Growth controls enacted in response to municipal finance concerns (i.e. water/sewer moratoria) also involve environmental policy. For example, Executive Order, 181, regarding development on Barrier Beaches, prohibits state and federal funds from being used to encourage growth and development in hazard prone barrier beach areas. Aside for financial considerations, housing development for any segment of the population has the potential to cause substantial environmental impacts. As such, potential environmental impacts from housing should be given equal consideration, in addition to municipal finance, when developing growth control measures.

On behalf of the Department, thank you for the opportunity to comment on the recommendations of the Barriers Commission Zoning Sub-Committee.

Sincerely,

Glenn Haas
Director
Division of Watershed Management

MAPC

Metropolitan Area Planning Council

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October 3, 2001

OCT 5 - 2001

Hon. Jane Gumble
Director
Department of Housing and Community Development
One Congress Street, 10th Floor
Boston, MA 02114

Dear Jane:

I appreciate the opportunity to comment on the draft report of the Zoning Committee of the Barriers Commission. While we are fully committed to creating affordable housing opportunities in the metropolitan region and the Commonwealth, there are several concerns in the approach and tone of the committee's report that need comment.

- We recognize that local regulation may, in fact, lead to increased costs of development. However, the legal framework for local regulation is based in state law. Local governments create zoning and subdivision regulations based on specific provisions of the General Laws of the Commonwealth. Significant case law exists which further restricts the rights of municipalities to regulate the use of land. Communities which overly constrain the supply of housing, are subject to the Comprehensive Permit statute. Finally, the unintended consequence of the outlook presented in the subcommittee reports would be to promote shopping centers and mansionization as much as subsidized or moderate income housing.

- We agree with the seven general themes in the opening section of the subcommittee's report. However, the proposed methods for dealing with these themes would lead to a take over of local government's powers and duties by state government. We do not believe that is the intention of the Commission and it is certainly not in the best interest of the Commonwealth and its municipalities.

- Further, the quality of life and the community character of Massachusetts and its municipalities are critical components in determining the economic future of the state. Community character, by definition, comes from the deliberative processes of planning and zoning regulations. Limiting the ability of communities to define their character by state mandates rather than freeing them up for creative initiatives works against the fundamental fabric of our state's competitive advantage. It would be more effective to use the state legal and regulative framework to hold communities accountable for their fair

share of moderate and affordable housing. The state can and should provide incentives and resources to communities to produce such housing. Finally, the state can and should encourage innovations by local government through selective changes to 40-A rather than homogenization of regulations and a pre-emption of home rule.

- Specifically, we are concerned about the following recommendations:

Municipal Cost Burden

1. We agree with a comprehensive local aid package. However, the administration's proposal submitted to the legislature redistributes existing aid and penalizes cities to the benefit of suburbs. Any local aid impact should draw from a new financial base.

Density Regulations

1. We disagree with this recommendation. Developers regularly succeed in creating market rate housing using the comprehensive permit to circumvent local regulations.

   Recommendations 2,3,4 are generally acceptable as encouragement and incentives.

Growth Control By-Laws

1. This appears to be a state pre-emption (DHCD approval) of current case law.
2. Every dwelling unit has an impact on local costs. However, some workable strategy could be developed around this issue to meet the goal of the recommendation.

Municipal Fees

General concerns about fees are noted, however, this should be under local control and based on local costs.

Subdivision Control Regulations

General concerns about construction standards are noted, but differential standards, based on local needs and concerns are critical.

Local Wetland Protection Bylaws

We agree with the minority report on this issue.

Appeals Process

We agree with the minority report on this issue.

Density Bonus Regulations

Generally these recommendations are positive.

Mixed Use Development Projects

1. This recommendation is a pre-emption of local regulations. We need to support communities to allow incentives to the creation of housing with the assistance of state financial resources. A partnership between state and local government on this issue is what is needed.

2. This recommendation is positive.

Brownfields Grant, Loan, and tax Programs

We agree with the minority report on this issue.

Urban Redevelopment Corporation

Communities should have the option of an 8% return.

Regional Housing Supply Planning

The state should work with the Regional Planning Agencies to provide tools for the communities to plan for and create housing opportunities and supply. The recommendation has the feel of a "top down" approach.

I look forward to working with you on this important matter.

Sincerely,

David C. Soule
Executive Director

October 25, 2001

Dear Members of the Barriers to Housing Commission:

In regard to the Building Code, Title V, and Zoning Subcommittee reports to the Barriers to Housing Commission the Massachusetts Executive Office of Environmental Affairs (EOEA) offers the following comments.

The Building Code Subcommittee Report:

The single current recommendation of significant concern is the recommendation to review local zoning bylaws to identify communities that are using zoning bylaws to supersede State Building Code. EOEA supports the ability of communities to freely plan and zone for growth and development, pursuant to the home-rule amendment. Caution is urged to ensure that the already overly limited ability of municipalities to creatively manage land use is not undercut in a legitimate effort to ensure compliance with the State Building Code. EOEA also suggests that the Barriers Commission recommend a review of the current State Building Code to ensure that the reuse of existing buildings is encouraged.

The Title V Subcommittee Report:

As Commissioner Lauren Liss of the Department of Environmental Protection (DEP) chaired this subcommittee, EOEA will largely defer to DEP on the matter of Title V. However, in several places the report refers to the inadequacy of zoning regulations and other planning tools to properly manage growth, and the improper use of Title V to attempt to fill this gap in the ability of local governments to effectively plan for and administer development. EOEA encourages the Commission to consider as an additional recommendation amendments to current planning, zoning, and subdivision enabling legislation. Reforms could provide communities with better tools in the areas of planning, zoning, and subdivision regulation, thereby helping to remove the temptation for municipalities to stretch their Title V regulatory authority to address concerns that would be handled through planning and zoning authority in other states.

The Zoning Subcommittee Report:

Current density regulations are referred to as the most significant barriers to housing production in the Commonwealth. They also promote land consumption and environmental degradation. EOEA offers comments to the Commission on the following recommendations:

Municipal Cost Burden:

Substantial data exists regarding the fiscal burden that new housing places upon communities. While a worthwhile project, the development of a uniform cost of

community services model that can be applied in all communities is fraught with difficulties, such as the widely varying levels of service provided by each of the municipalities. Producing reliable results that can receive uniform acceptance and thus serve as the basis for programs to defray local costs will be a challenge, one in which EOEA is willing to assist. Note that Proposition 2 ½ also has substantial impact upon municipal finance, growth management, and the provision of housing, a topic, which is not addressed in the recommendations.

Density Regulations:

EOEA supports efforts to encourage local adoption of higher density zoning regulations, preferably with a mix of uses, and would be willing to serve on a Committee that examines tools for providing additional housing production in concert with improvements in environmental protection, transportation planning, and other areas of growth and development.

The zoning and subdivision regulations currently in place in the vast majority of Massachusetts cities and towns are detrimental not just to providing an adequate and affordable housing supply, but to the environment and quality of life in Massachusetts as well. Over the course of the past several years EOEA has been using buildout analyses illustrating the shortcomings of current zoning to encourage communities to consider alternatives to the status quo. In short, EOEA stands ready to assist in efforts to persuade municipalities, developers, and other parties to alter current density regulations in order to produce more sustainable, affordable development that will provide a better quality of life for current and future residents.

In regard to a specific recommendation offered by the Subcommittee communities may not be very receptive to a 40B-based approach, given widespread dissatisfaction with the Comprehensive Permit process and products.

Growth Control Bylaws:

For almost three years EOEA's Community Preservation Initiative has focused on providing tools and information to communities so that they are better prepared to make local land use decisions. EOEA took this empowerment of local decision-makers approach instead of seeking regulatory reforms that would provide it or other state agencies broader authority to directly review or manage local growth decisions. Based on this philosophy EOEA does not believe that Department of Housing and Community Development review is in the best interest of the Commonwealth. Currently local bylaws require approval by the Attorney General. In addition, past court cases have provided a framework within which communities can utilize this tool. EOEA believes that these mechanisms are sufficient to ensure that growth control bylaws are used for legitimate purposes.

Many legitimate uses of growth control bylaws may temporarily, or even permanently, limit construction of new housing or other types of development. For

example, in addition to the scenarios included in the Subcommittee's report it is reasonable for communities to restrict permits to an annual level that allows for a moderate level of long term growth in order to adequately provide infrastructure and local facilities while maintaining a stable local tax rate. In addition, natural resources are finite, and the time is coming when limits may be reached. Already, some watersheds, the Ipswich most notably, are near or over their capacity to provide further water supplies. A growth control bylaw that restricts further growth to that which can be supplied by reducing water use by existing homes or businesses, or by eliminating leaks in the local water supply system, would be a legitimate use of a growth control bylaw. Finally, granting dwelling units of two bedrooms or less a broad exemption to growth control bylaws enacted for financial reasons (presumably because they have little or no education costs associated with them) does not account for the admittedly less significant financial burden of providing police, fire, and other general government services.

Subdivision Control Regulations:

Excessive subdivision control regulations can also be a barrier to the supply of housing and are certainly a factor in the cost of new housing units. A guidebook drafted by an appropriately representative body may help communities to select more appropriate subdivision standards. A conservation subdivision design guidebook funded by EOEA and completed by the Metropolitan Area Planning Council may be useful to those drafting the recommended subdivision guidebook.

Local Wetland Protection Bylaws:

While amendments to local wetlands protection regulations are cause for concern, EOEA defers to DEP for specific comment on these recommendations. In general, however, EOEA believes that communities should have the ability to implement local bylaws or ordinances that address the unique environmental resources of the community.

Density Bonus Regulations:

EOEA is supportive of a provision that would allow communities to permit housing bonuses as of right. However, while this small amendment to the Zoning Act would be helpful a larger effort to address the shortcomings of the Zoning Act is likely to have many benefits to those interested in improving the patterns of growth and development in the Commonwealth, including the provision of more affordable housing.

In addition, EOEA is interested in assisting DHCD in the development of the density bonus bylaw package, as it relates to Conservation Subdivision Design Bylaws and other development techniques that EOEA has developed and will broadly distribute in a forthcoming Community Preservation Toolkit.

Mixed Use Development Projects:

EOEA is very supportive of any effort to promote mixed-use development. While this is certainly appropriate for corporate campuses and other large-scale developments (South Weymouth, Makepeace, etc.), most development in Massachusetts is of a smaller scale. By developing smaller projects, or even individual homes or businesses in a manner consistent with the mixed use developments of our past we can incrementally add to our hamlets, villages, and cities instead of continuing to build the anywhere U.S.A. subdivisions, office and industrial parks, and malls of the present. Traditional neighborhood design or New Urbanism has gained widespread support across the country as an alternative to the status quo. EOEA looks forward to working with all interested parties to bring the ideas of these movements to the attention of land use decision makers in Massachusetts.

Regional Housing Supply Planning:

EOEA supports regional housing supply planning, although a tools and information and/or incentives based approach may be preferable to the utilization of regulatory tools to achieve housing objectives.

In conclusion, caution is urged in regard to changes to local authority to manage growth and development. In many ways additional discretion on the part of local governments to creatively exercise their land use authority is needed, while at the same time certain very limited applications of regional or state preemption of local authority may be warranted. Certainly, EOEA is also concerned that implementation of any recommendations resulting from the work of the Commission result in improved stewardship of our natural resources, and not a weakening of necessary environmental protections. I thank you for the opportunity to provide comments to the Barriers to Housing Commission and look forward to working with DHCD and other parties to move forward in the interest of the citizens of Massachusetts.

Sincerely,

Kurt Gaertner
Director of Growth Planning